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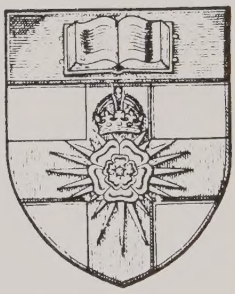

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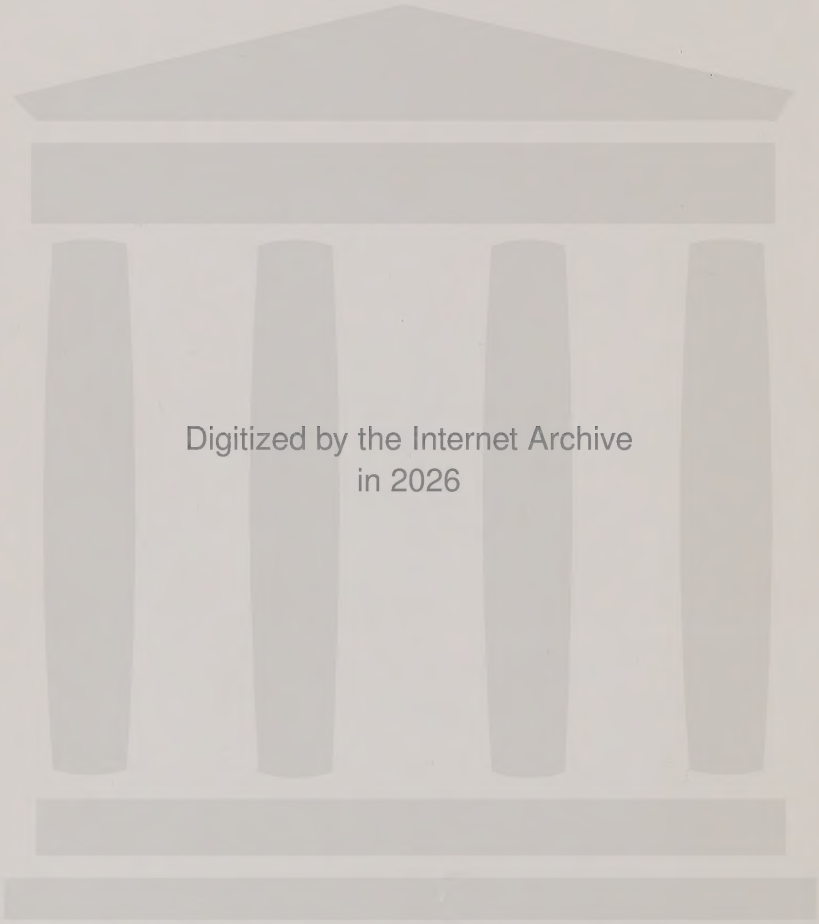
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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

JOSEPH RAND, LIMITED *v.* CRAIG.

C. A.
1918
NEVILLE J.
July 17
C. A.
October 16.

[1918 J. 253.]

Master and Servant—Scope of Servant's Authority—Tortious act done in Course of Employment—Responsibility.

Carters were employed by a contractor by the day to take rubbish from certain works to his dump and to tip it there, and were strictly forbidden to tip it anywhere else. Some of the carters, without the knowledge of the contractor, and in contravention of their orders, took the rubbish to a piece of unfenced land, the property of the plaintiffs, and tipped it there. They did this for their own convenience and for a purpose of their own. The unfenced land was nearer to the works than the dump of the contractor. In an action by the plaintiffs against the contractor for an injunction:—

Held, by the Court of Appeal, affirming the decision of Neville J., that the illegal acts complained of were not within the sphere of the carters' employment, and consequently that the contractor was not liable for them.

Lloyd v. *Grace, Smith & Co.* [1912] A. C. 716 distinguished.

WITNESS ACTION.

The plaintiffs were the owners of a piece of vacant building land at Silvertown, West Ham, which was not fenced. The defendant was a carman and contractor carrying on business

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JOSEPH RAND v. CRAIG.

at Silvertown aforesaid, and in the course of his business carted and removed rubbish in the eastern districts of London.

The plaintiffs in their statement of claim alleged that in the months of November and December, 1917, and the month of January, 1918, the defendant wrongfully caused ashes, dust, and rubbish so carted or removed by him as aforesaid to be deposited on the plaintiffs' said piece of land; that in May, 1918, the defendant caused two further loads of rubbish to be deposited on the plaintiffs' said piece of land, and threatened and intended to repeat the acts complained of; and the plaintiffs claimed an injunction to restrain the defendant, his servants, and agents from depositing ashes, dust, rubbish, or any other materials upon the plaintiffs' said piece of land.

The defendant in his defence denied the allegations of the plaintiffs, and pleaded that if (which he did not admit) any person in his employment had at any time trespassed upon the plaintiffs' land or deposited ashes, dust, or rubbish thereon, such trespass had been committed, and such act had been done, without his authority and against his express orders.

The evidence on behalf of the plaintiffs was to the effect that during the period in question carts bearing the defendant's name, and full of rubbish, had been driven to the plaintiffs' land and backed across the kerb and pathway of the road on to the plaintiffs' land. The rubbish was then tipped on to the land and the carters drove hastily away. It was difficult to intercept them, but when stopped or overtaken the carters used abusive and threatening language and refused to give their names. A letter written by the plaintiffs' solicitor to the defendant complaining of the nuisance had remained unanswered, and the nuisance had continued.

The defendant said that in the course of his business he contracted with Lyle & Co. and other firms at East Ham to remove ashes and other rubbish from their works. He had a private dump or shoot of his own at Beckton Road. He sold the rubbish and sometimes sent it by rail. He employed about forty carters by the day and paid them at night and told them every morning what they were to do. He allowed four journeys from Lyle & Co.'s works to his dump as a day's work for a two-wheel cart, and three journeys for a four-wheel

cart, and if a carter made an extra journey in the day he was paid extra for it. Lyle & Co.'s works were nearer to the plaintiffs' land than his dump. The plaintiffs' letter was not answered through inadvertence, but on receipt of it he questioned every carter in his employ, and they all denied having tipped rubbish on the plaintiffs' land. He strictly forbade them to do it, and told them that if they tipped rubbish anywhere else than where he told them they would be dismissed. He had no means of checking his carters, and could give no reason for their conduct unless they did it for their own convenience.

The action was heard by Neville J. on July 17, 1918.

Jenkins K.C. and *Manning* for the plaintiffs. The defendant is responsible for the wrongful acts of his servants done in the course of their employment, which was to cart away rubbish. The fact that they disregarded his orders is immaterial: *Limpus* v. *London General Omnibus Co.* (1)

Ward Coldridge K.C. and *Timins* for the defendant. A master is not liable where his servant wilfully does an illegal act in contravention of his orders: *Lyons* v. *Martin* (2); *Lewis* v. *Read* (3); *Storey* v. *Ashton* (4); *Gregory* v. *Piper.* (5) The general rule is that the master is liable for every such wrong of the servant as is committed in the course of service and for the master's benefit, though no express command or privity of the master be proved: *Barwick* v. *English Joint Stock Bank* (6); *Limpus* v. *London General Omnibus Co.* (1) Here the carters, in direct contravention of their strict orders, and for their own convenience, commit a trespass for which, it is submitted, the defendant is not liable.

Jenkins K.C. in reply. These acts of the carters were done within the scope of their authority and in the course of their employment, for which their master is liable: *Swire* v *Francis.* (7) The notion that the illegal act of the servant must be done for the master's benefit—*Ruben* v. *Great Fingall*

(1) (1862) 1 H. & C. 526.
(2) (1838) 8 Ad. & E. 512, 515.
(3) (1845) 13 M. & W. 834.
(4) (1869) L. R. 4 Q. B. 476.
(5) (1829) 9 B. & C. 591.
(6) (1867) L. R. 2 Ex. 259, 265.
(7) (1877) 3 App. Cas. 106.

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Consolidated (1)—is dissented from in *Lloyd* v. *Grace, Smith & Co.* (2)

NEVILLE J. In this case the plaintiff company, which is in a large way of business, sues the defendant, who contracts for the removal of what I will call rubbish, for an injunction restraining him from depositing such rubbish upon the land of the plaintiffs. It appears that the plaintiffs have a considerable area of unbuilt-on land, parcel of a larger property of which a good deal has already been developed, which is unfenced and merely separated from the highway on one side of it by a pavement and kerb. Their complaint is that the defendant's carts, filled with rubbish, are drawn over the kerb and pavement from the highway on to their unfenced land and that there the rubbish is from time to time tipped, and the question is whether under the circumstances they are entitled to obtain an injunction and to recover damages against the defendant on account of what has been done undoubtedly by his carters.

The story is shortly this : The defendant contracts to remove rubbish. That rubbish is taken in carts, sometimes to dumps either belonging to him, or upon which he has acquired a right to dump, or the rubbish is conveyed to his customers by rail or otherwise. For the purpose of his business he has of course to use carts and to employ carters, whom he pays so much a day, according to the job that they do. The job is settled for them in the morning. They have to take so many loads of rubbish to some particular destination, in respect of which they are paid. If they are able to put in an extra load they get an extra payment. There is no doubt that some carters of the defendant did from time to time deposit rubbish in the course of removal in these carts upon the plaintiffs' piece of unbuilt-on land. It is not a case in which the rubbish the defendant contracted to remove was carted straight off and dumped upon this ground. It is clear upon the evidence that it is a stray carter here and there who does this tipping, and undoubtedly against the express directions of the defendant. The question is whether he is liable although

(1) [1906] A. C. 439, 446. (2) [1912] A. C. 716, 731, 738.

he has forbidden them to do it, and what he instructed them to do is something quite different. I think that the liability of employers in such a case is laid down, as well certainly as anywhere, by Martin B. in *Limpus* v. *London General Omnibus Co.* (1), and on motion for a new trial his ruling was upheld by a very strong Court. The learned judge directed the jury (2) "that, when the relation of master and servant existed, the master was responsible for the reckless and improper conduct of the servant in the course of the service; and that if the jury believed that the real truth of the matter was that the defendants' driver, being dissatisfied and irritated with the plaintiff's driver, whether justly or unjustly, by reason of what had occurred, and in that state of mind acted recklessly, wantonly, and improperly, but in the course of his service and employment, and in doing that which he believed to be for the interest of the defendants,"—I will leave for the moment the question of the master's interest—"then the defendants were responsible for the act of their servant: that if the act of the defendants' driver, in driving as he did across the road to obstruct the plaintiff's omnibus, although a reckless driving on his part, was nevertheless an act done by him in the course of his service, and to do that which he thought best to suit the interest of his employers and so to interfere with the trade and business of the other omnibus, the defendants were responsible: that the liability of the master depended upon the acts and conduct of the servant in the course of the service and employment; and the instructions given to the defendants' driver, and read in evidence to the jury, were immaterial if the defendants' driver did not pursue them; but that if the true character of the act of the defendants' servant was, that it was an act of his own, and in order to effect a purpose of his own, the defendants were not responsible." Now it is said that recent decisions show that to-day that direction to the jury would not be upheld because of the reference to the servant doing that which he believed to be for the interest of the master. I think the analogy between cases of this class and *Ruben* v. *Great Fingall*

(1) 1 H. & C. 526. (2) 1 H. & C. 529.

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Consolidated (1) and *Lloyd* v. *Grace, Smith & Co.* (2), is not perfect. There seems to me to be a natural distinction between a case where a man directs another to do a particular act and a case where a man in business appoints an agent for the purpose of carrying on the business and holds out that person as the person to whom the public are to apply if they do business with him. I do not think the cases in the House of Lords in any way affect the present case, having regard to the view I take of the facts; but, in passing, it seems to me with regard to the question of acts done for the master's benefit that we must now take the law to be as stated in *Lloyd* v. *Grace, Smith & Co.* (2), and not as stated in *Ruben* v. *Great Fingall Consolidated* (1). What I have to consider here is whether what was done was done in the course of their employment by the carters of the defendant. To put it in another way, was the true character of the acts of the defendant's servants that they were acts of their own, and in order to effect a purpose of their own—in which case the principal would not be responsible—or were the acts of the carters all done in the course of their employment, obeying the defendant's instructions? The employment was to load up at certain premises with rubbish and to carry that rubbish to a particular destination and there discharge it. Instead of doing that, what some of these carters did was entirely for their own benefit and without any regard to or intention of carrying out the job for which they had been employed by the master, namely, to take this rubbish off to the nearest place where they could get rid of it and throw it down there and make off. Were these acts within the scope of the employment of the carters? In my opinion they were not. It appears to me that they come expressly within the terms of an act of their own, and in order to effect a purpose of their own. Instead of carrying out the job which the employer had given them, they did something totally different, and in order to enable them, without fulfilling their employment at all, to obtain payment from their employer of their hire. That appears to me to be the reason and really the purport of the

(1) [1906] A. C. 439. (2) [1912] A. C. 716.

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whole of the action on the part of the carters. They shirked their job by tipping this rubbish on the plaintiffs' land. I think, therefore, the defendant is not responsible for their acts, and that the action fails and must be dismissed with costs.

H. L. F.

C. A.

From this decision the plaintiffs appealed. The appeal was heard on Oct. 16, 1918.

Jenkins K.C. and *Manning* for the appellants. The question is whether the acts of the carters were authorized by the defendant. The learned judge has held that these acts were not within the scope of the carters' employment. If they were, then it is immaterial whether they were authorized by the defendant or not. What is meant by "in the course of the employment"? As to this see *Citizens' Life Assurance Co.* v. *Brown.* (1) Here the employment was continuous, and the particular acts of the carters were done in the course of it. *Limpus* v. *London General Omnibus Co.* (2), *Lloyd* v. *Grace, Smith & Co.* (3)

Whether the acts complained of were done for the benefit of the defendant or not is immaterial. See judgment of Farwell L.J. in *Lloyd* v. *Grace, Smith & Co.* (4) and *Ruben* v. *Great Fingall Consolidated.* (5)

[DUKE L.J. referred to *Whetman* v. *Pearson.* (6)]

The defendant's carters violated their instructions, but did not depart from the course of their employment. The employment was to cart rubbish away, and it is immaterial that the carters disregarded the instructions of the defendant.

Ward Coldridge K.C. and *Timins* for the respondent were not called upon.

SWINFEN EADY M.R. In my judgment, the view that Neville J. took was right, and his order cannot be disturbed. The action is brought by the owners of some vacant land against the defendant, a carman and contractor, to obtain an injunction and damages for trespass alleged to have been

(1) [1904] A. C. 423, 428.
(2) 1 H. & C. 526.
(3) [1912] A. C. 716, 731, 738.
(4) [1911] 2 K. B. 507.
(5) [1906] A. C. 439, 446.
(6) (1868) L. R. 3 C. P. 422.

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committed by the defendant, and the alleged trespass is that the defendant, acting by his servant, removed from the premises of a third party certain refuse and deposited it upon the plaintiffs' land. Now, of course, if that were proved there would be an actionable wrong, of which the plaintiffs would be entitled to complain. But the defendant denies that he has committed the trespass alleged, and he says it was not done by him or by his authority, and if it was done by any carman of his it was done not only without his authority, but against his express orders. It appears from the facts proved at the trial that the defendant, who is a contractor in a considerable way of business, employs certain men to act as carters. They are employed by the day, and they are paid at the end of the day for the day's work. The course of business in which these men were engaged was this, that they were to go in the morning with carts to particular premises to load rubbish, and they were then to take the rubbish to some other premises that were defined and described, and particulars of which were given to the carmen, and in respect of each load a ticket was given them which had cost the defendant 6d. They were to go with their load of rubbish and the ticket to the premises of the person who issued the ticket, and by virtue of the ticket they had a right to shoot their load of rubbish on the premises owned or occupied by that person. That was the whole of their employment, and their duty was to convey from the premises where they loaded to the premises where they discharged three loads a day, and they were paid a fixed day's wage for that work. It was suggested that they were employed generally to cart rubbish, and only had instructions as to where they were to put it. But the evidence negatived that. They were employed to cart rubbish from, and to, defined premises, and they were given authorized permits that enabled them to shoot there the rubbish they so carted. Now it is proved and accepted by the learned judge that in certain cases persons in the employ of the defendant, for their own purposes, and deliberately, instead of taking their loads of rubbish to the premises on which the

ticket enabled them to unload, took them to the plaintiffs' premises and shot the rubbish there. To some extent crossing the pavement and entering upon the plaintiffs' premises was a deviation from their journey. Whether the plaintiffs' premises are situated on the direct route of their journey from the place where they loaded to the place where they ought to have discharged does not appear. But in any case the acts of which they were guilty were acts done deliberately of their own choice and to effect a purpose of their own, and in opposition to the express instructions of their employer. The purpose of their own suggested was probably either to indulge their laziness or to give them an opportunity of spending an extra time in the public-house, but at any rate it was entirely a purpose of their own. The acts of which they were guilty were their own deliberate acts. It is not a case of carelessness or negligence in the course of their employment. In my judgment it is a case, on the facts proved, of departing from the course of employment, and for their own purposes deliberately committing the acts in question. Under these circumstances I am of opinion that the learned judge on the facts proved before him, arrived at a right conclusion, and on the facts so proved the trespasses complained of were not acts done in the course of the employment for their master for which he can be rendered liable. On these grounds I am of opinion that the appeal fails, and must be dismissed.

DUKE L.J. I had some doubt in the course of the discussion of this case whether, on the whole, the plaintiffs did not make out a case calling for an answer on the facts as proved, but I have come to the conclusion that upon the findings of fact of the lear ned judge the judgment ought to be upheld. The learned judge dealt with the matter as a question of fact, and I cannot doubt that if there had been a verdict of a jury to the same effect as the finding of the learned judge that verdict would have been upheld in this Court. I may add that I think very little additional evidence against the defendant, either of complicity by himself or any superior servant of his, or of acquiescence after a course of warning of conduct such as is complained of here, would have entitled

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either a jury or a judge of fact to find that the thing was by conduct of the defendant brought within the scope of the employment, notwithstanding anything he had said to the workman to the contrary, and in such a state of facts I think a judgment for the plaintiffs might well have been upheld. I think that it is incumbent on the defendant to take a good deal of care, after what has happened in this case, that carts which are his property, and rubbish which is his property, are not suffered to be at large and to be a means of nuisance to other members of the community.

EVE J. I am of the same opinion. I think the acts of the carters which are complained of were not done in the course of, but were altogether outside the scope of the employment. When once that decision is arrived at as a matter of fact there can, I think, be no ground on which the employer could be held liable for the results that followed.

Appeal dismissed.

Solicitors for plaintiffs: *Oldmam, Cornwall & Wood Roberts.*
Solicitor for defendant: *H. A. Phillips.*

G. A. S.

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June 17, 18, 19, 20, 21, 25, 26, 27, 28; *July* 2, 3, 4, 31.

[1917 W. 358.]

Highway—Repairs—"Extraordinary Traffic"—Expenses—Measure of Damage—Steam Waggons and Trailers—Standard of Repair—Nuisance—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 *Vict.* c. 77), *s.* 23—*Locomotives Act*, 1898 (61 & 62 *Vict. c.* 29), *s.* 12, *sub-s.* 1 (*b*).

In August, 1913, the defendants, who were quarry owners in the neighbourhood of a residential town, commenced the haulage of limestone and goods along roads in the plaintiffs' district by means of a steam waggon and trailer weighing, when loaded, 12 tons and 8 tons respectively. Before this date the defendants had used horse-drawn carts and waggons of a maximum weight of 3 tons. Damage to A and B roads became apparent, and in January, 1916, a second steam waggon and trailer were used. The total weight drawn along "B" road during the year ending March 31, 1913, was 13,524 tons, of which 12,108 tons passed also over "A" road. In the year ending March 31, 1914, when the first steam waggon and trailer were used, and when 25,645 tons were drawn over "B" road, of which 22,347 tons passed along "A" road, 6838 tons were transported over both roads by steam traction. In the year ending March 31, 1915, the total increased to 27,096 tons, of which 13,119 tons were carried by steam over both roads. Damage was subsequently done to two other roads. The quarrying of stone, and the haulage thereof, and of lime had been local industries for many years in the plaintiffs' district, and quarry owners in recent years had almost universally substituted mechanical for horse traction.

In an action commenced on February 21, 1917, the plaintiffs claimed a sum of 1750*l.* for the extraordinary expenses incurred in repairing these four roads, owing to the extraordinary traffic of the defendants during the twelve months prior to the issue of the writ, and also damages for nuisances caused by the defendants prior to 1916 in respect of A and B roads.

Held, on the evidence, and applying *Hill* v. *Thomas*, [1893] 2 Q. B. 333, that the steam waggon traffic on the four roads was exceptional and "extraordinary" within the meaning of s. 23 of the Highways and Locomotives (Amendment) Act, 1878. In a case where the frequent passage of concentrated weight was the element relied on as making the traffic extraordinary, the proper test to apply was to ascertain whether, at the time of the introduction of the means of transporting this concentrated weight, there was any existing traffic imposing a burden on the road comparable with it in quality or frequency. If there was it might well be that the new departure—although it increased the burden on the road—did not alter it, and was therefore only in the nature of increased ordinary traffic; if there was not any such pre-existing traffic then the innovation was not ordinary, but extraordinary, traffic.

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But *held*, on the evidence, that the total amount claimed for extraordinary expenses must be reduced to 280*l.*, the sum claimed in respect of "A" road being wholly irrecoverable, not having been incurred within 12 months preceding the commencement of the action, according to s. 12 of the Locomotives Act, 1898.

Held, further, that no case of public nuisance had been established.

The writ in this action was issued on February 21, 1917, the plaintiffs being the highway authority for the urban district of Weston-super-Mare. The material facts as to the alleged "extraordinary traffic" caused by the defendants upon four public highways within the plaintiffs' district are taken from the judgment of the Court:—

"The defendants are quarry owners working a limestone quarry and kilns situate on the Mendip Hills, lying to the N.E. of, and overlooking, the town of Weston-super-Mare. The greater part of the town, which has developed very rapidly during the last 30 years, was built of stone drawn from the defendants' quarry and several others in its immediate vicinity. For some time past only two of these quarries have been worked—that belonging to the defendants and another close by, from which the plaintiffs obtain part of the stone required for the repair of highways under their control, and of late years the principal part of the defendants' business has been the burning of lime, and the despatch thereof by rail from the Great Western Railway Station, which is situate towards the S.W. end of the town. With few negligible exceptions the stone and lime have been carried to the town and railway station along Bristol Road—a road formed on, and at right angles to, the slope of the hill, and running approximately from East to West and then down two roads, Arundel Road and its extension, Albert Quadrant, both running in a southerly direction at a somewhat steep gradient down the hill into the town. These three roads, and more particularly the two first-named ones, constitute the principal approach to Weston from the Mendips, and in addition to being used for the cartage of stone and lime are traversed by persons coming from, and returning to, the neighbouring village of Milton; by market gardeners and others bringing produce into the town; by charabancs, motor cars, taxi cabs,

and other conveyances taking residents and visitors to the houses situate on the hill and to the golf links; for drives into the surrounding country; and by tradespeople serving the said houses. Down to the month of August, 1913, the stone and lime brought from the defendants' quarry, and the coal carried thither, were transported in horse-drawn carts and waggons of a maximum weight of 3 tons, or thereabouts. The total weight so drawn was large. Along the Bristol Road during the year ending March 31, 1913, it amounted to 13,524 tons, of which 12,108 tons passed also over Arundel Road. In August, 1913, the defendants commenced to use a steam waggon and trailer, and in the year ending March 31, 1914, when there were drawn over the Bristol Road 25,645 tons, of which 22,347 tons also passed along Arundel Road, 6838 tons were transported over both roads by steam traction. In the year ending March 31, 1915, the total increased to 27,096 tons, of which 13,119 tons were carried by steam over both roads; and in the year ending March 31, 1916, when the total fell to 22,905 tons, there passed along the Bristol Road 15,046 steam-transported tons, of which 14,736 tons passed also over the Arundel Road.

"In January, 1916, a second steam waggon had been added. The necessity for this arose chiefly from shortage of labour, and the fact that many of the defendants' horses had been commandeered for national purposes. When loaded, the waggons each weigh 12, and the trailer 8 tons. Between August, 1913, and February, 1917, the loaded waggon and trailer made 4667, and the loaded waggon without the trailer 1533 journeys along the Bristol Road. The Arundel Road was closed for repairs in July, 1916, but between August, 1913, and June, 1916, the figures were practically the same as those for the Bristol Road. The waggons and trailers used by the defendants are of a first-class type, the quarrying of stone and the haulage thereof and of lime have been local industries for many years past, and quarry owners in recent years have almost universally substituted mechanical for horse traction."

By their statement of claim the plaintiffs alleged that the

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first steam waggon and trailer and the extraordinary traffic caused by them damaged Arundel Road and Bristol Road by crushing and breaking up the surface thereof, by making deep ruts, holes, and corrugations, and—as to Arundel Road—by squeezing it out of shape, and by forcing the stones forming the foundations through the surface of the road, and that the second steam waggon and trailer contributed to, and aggravated, the damage, so that in February, 1914, and again at the beginning of 1916, these roads were a source of danger and a nuisance to the public, and the plaintiffs were put to considerable expense in repairing the same. Arundel Road in particular had to be completely reconstructed at a cost of 992*l*. Similar allegations were made as to the effect of this traffic in 1916 on Upper Church Road and Park Place. There were also allegations of excessive weights being carried, and at excessive speeds.

On February 19, 1917, four certificates were made by Harold Arthur Brown, the surveyor of the plaintiffs, in pursuance of the provisions of s. 23 of the Highways and Locomotives (Amendment) Act, 1878, from which it appeared that, having regard to the average expenses of repairing highways in the neighbourhood, extraordinary expenses had been incurred by the plaintiffs in respect of these four roads during a period commencing February 21, 1916, and ending February 19, 1917, namely—in repairing Arundel Road, 890*l*.; Bristol Road, 400*l*.; Upper Church Road, 420*l*.; and Park Place, 40*l*. The plaintiffs claimed (1.) these sums as the expenses of extraordinary traffic within the meaning of s. 23 of the Highways and Locomotives (Amendment) Act, 1878, and in the alternative the like sums as damages suffered between February 21, 1916, and February 19, 1917, by reason of the wrongful and excessive user of the said roads; and (2.) the further sums of 118*l*. and 95*l*. as damages suffered by the plaintiffs prior to February 21, 1916, by reason of the wrongful user of Arundel Road and Bristol Road by the defendants, and by reason of nuisances caused by them. The defendants submitted by their defence that the quarrying of stone was a well-recognized local industry, and the haulage of lime,

limestone, and coal formed a class of traffic which was reasonably to be expected upon the said roads. They did not admit the weights of the steam waggons, trailers, and loads, and denied the allegation as to excessive speed, and that the traffic was extraordinary. They also denied the allegations of damage, but submitted that if any such was sustained it was brought about by reason of the plaintiffs having failed to keep and maintain such roads in a condition to withstand the ordinary traffic to be expected thereupon. As a further alternative they alleged that no such damage was done within the period of twelve months prior to the date of the writ in the action, and the plaintiffs were prevented from recovering in respect of such damage by reason of the provisions of sub-s. 1 (b) of s. 12 of the Locomotives Act, 1898. There was also an allegation that if the sums stated in the claim had been spent (which was denied), the result of such expenditure had been to put the roads in a better condition than they were in at the date of the commencement of the steam traffic complained of, and deductions from the expenses should be made.

Numerous witnesses were called on both sides on the nature of the traffic, the damage caused to the roads, and the expenses incurred in executing repairs. The result of the evidence sufficiently appears from the judgment.

Macmorran K.C. and *Joshua Scholefield* for the plaintiffs. The question is whether the traffic caused by the defendants is " extraordinary traffic " within the meaning of s. 23 of the Highways and Locomotives (Amendment) Act, 1878. By that section the road authority is enabled, where extraordinary expenses have been incurred in repairing a highway by reason of extraordinary traffic thereon, to recover such expenses from the persons responsible for such traffic. The numerous cases on the question of what amounts to extraordinary traffic are reviewed in *Hill* v. *Thomas* (1), and the definition of the expression set out in the headnote from the judgment of Bowen L.J. governs the present case.

That case was followed in *Etherley Grange Coal Co.*

(1) [1893] 2 Q. B. 333.

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v. *Auckland Highway Board* (1), where the standard of comparison by which to determine whether traffic was "extraordinary" within the meaning of s. 23 was the ordinary traffic on the road there in question, not that on other roads in the district.

Subsequent authorities on the same question are *Barnsley British Co-operative Society* v. *Worsborough Urban Council* (2); *Abingdon Rural Council* v. *City of Oxford Electric Tramways* (3); *Cambridgeshire County Council* v. *Pepper & Hollis.* (4) The damage caused to the four roads in question here is directly attributable to the steam waggon and trailer traffic, and was aggravated by excessive weight being occasionally carried, and the speed of five miles an hour being exceeded in places on the roads. We also contend that traffic such as this really amounts to a common law nuisance within the authorities: *Attorney-General* v. *Scott* (5); *Cavan County Council* v. *Kane.* (6) In this last case a traction engine of excessive weight, causing damage to a public road, was held to be a nuisance. With regard to deductions from the expenses of repair owing to the principle of betterment raised by the defence, that does not apply here. It was absolutely necessary that the foundations of Arundel Road should be completely renewed: *Savin* v. *Oswestry Highway Board* (7); *Colchester Corporation* v. *Gepp.* (8) On the damage being proved the plaintiffs are entitled to the relief asked.

Maugham K.C. and *W. A. Jowitt* for the defendants. This was not "extraordinary traffic" within the meaning of s. 23 of the Act of 1878. The definition of these words in *Hill* v. *Thomas* (9) is wanting in precision, and lays down no standard for ascertaining what is ordinary traffic. On the evidence here the traffic was not extravagant, or continuous, or of excessive weight or carried on at excessive speed. No complaint on these heads was ever made by anyone to the plaintiffs. The increase in the number of motor waggons from one to

(1) [1894] 1 Q. B. 37.
(2) [1916] 1 A. C. 291.
(3) [1917] 2 K. B. 318.
(4) (1912) 76 J. P. 393.
(5) [1904] 1 K. B. 404.
(6) [1913] 2 I. R. 250.
(7) (1880) 44 J. P. 766.
(8) (1912) 76 J. P. 337.
(9) [1893] 2 Q. B. 333.

two did not increase the amount of the stuff carried, as the journeys were fewer for each waggon. The traffic was really the ordinary traffic that was to be expected in such a district, and it was the duty of the local authority to provide and maintain roads suitable to carry it. Roads should be repaired up to the existing standard of traffic: *Bromley Rural Council* v. *Croydon Corporation* (1); *Wallington* v. *Hoskins* (2); *Hemsworth Rural Council* v. *Micklethwaite* (3); *Chichester Corporation* v. *Foster* (4); *Attorney-General* v. *Sharpness New Docks and Gloucester and Birmingham Navigation Co.* (5); *Attorney-General* v. *Great Northern Ry. Co.* (6); *Shepton Mallet Rural Council* v. *John Wainwright & Co.* (7) As to the claim for damages for a public nuisance there is no evidence to support it, and the Attorney-General should have been a party to the action. Lastly, the damage to the two roads, especially that to Arundel Road, was done before 1916, and therefore not within a year of the date when this action was brought: Locomotives Act, 1898, s. 12, sub-s. 1 (b); *Attorney-General* v. *Scott.* (8) The expenses of these repairs are not therefore recoverable at all.

Macmorran, K.C. in reply. If the traffic put on the roads was beyond what was ordinary the plaintiffs are entitled to recover the increased cost of repairing them: *Barnsley British Co-operative Society* v. *Worsborough Urban Council.* (9) As to the time within which the plaintiffs can recover damages it is sufficient if the damage has been caused and the expenses incurred within a year of the commencement of the action.

On the question of damages for nuisance he referred to *Egerly's case* (10), *Reg.* v. *Leech* (11), and *Attorney-General* v. *Scott.* (12)

Cur. adv. vult.

July 31. EVE J. The plaintiffs allege that extraordinary expenses have been incurred by them in repairing four highways

(1) (1907) 6 L. G. R. 165.
(2) (1880) 6 Q. B. D. 206.
(3) (1904) 2 L. G. R. 1084, 1089.
(4) [1906] 1 K. B. 167.
(5) [1914] 3 K. B. 1.
(6) [1916] 2 A. C. 356.
(7) (1908) 72 J. P. 459.
(8) [1905] 2 K. B. 160.
(9) [1916] 1 A. C. 291.
(10) (1665) 3 Salk. 183.
(11) (1703) 6 Mod. 145.
(12) [1904] 1 K. B. 404.

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by reason of damage caused thereto by extraordinary traffic thereon, and they seek to recover from the defendants sums amounting in the aggregate to 1750*l.* in respect of such expenses. There is a further, and in part alternative, claim to recover the same sum and other monies as damages for nuisances caused by the defendants on two of the highways in question, but it will be more convenient to defer the consideration of this part of the plaintiffs' case until I have disposed of their claim to the statutory remedy.

The defendants do not dispute that they are the persons by whose orders the traffic was conducted, but they deny that it was in any respect extraordinary; and, amongst other defences, they raise one which involves the question whether ordinary traffic over the highway becomes extraordinary when the method of transport is so altered as materially to increase the cost of repairing the highway, or in other words, is the increased cost due to the alteration in the mode of transport recoverable under s. 23 of the Highways and Locomotives (Amendment) Act, 1878, from the person so using the highway, or does the obligation lie upon the highway authority to render the highway capable of sustaining the new method of transport without excessive wear and tear.

I think it is clear that this question is not one capable of an answer applicable to all circumstances. The liability of the road authority to accommodate its highways to the requirements of developing traffic—that is to say, to traffic of greater volume and weight, and travelling at a higher rate of speed—has been recognized in many reported cases; but, as a rule, in circumstances in which the increase in these respects has reached a stage at which the developed traffic can accurately be regarded as already of the nature of ordinary traffic. There are, on the other hand, cases in which the pioneers of new methods of transport, afterwards widely adopted, have been called upon to contribute largely to the first cost of adapting roads to such new methods. The difficulty in this and many similar cases is in determining on which side of the line dividing the two extremes the facts place it, and before proceeding further to consider this question

it will be convenient that I should state the material facts. [His lordship stated the facts relating to the character and extent of the traffic as set out above, and continued :]

Upon these facts two questions, as it appears to me, arise, (1.) did the defendants impose extraordinary traffic on these roads when they adopted steam traction ; and (2.) if so, had that traffic ceased to be extraordinary and so far become ordinary traffic in the early part of 1916 as to impose on the plaintiffs the obligation of providing roads adequate to carry it ? Although the answer to each of these questions involves a finding of fact, I think there are authorities binding on me which indicate clearly what these findings ought to be. In *Hill* v. *Thomas* (1), according to the Court of Appeal, extraordinary traffic denotes " a carriage of articles over the road, at either one or more times, which is so exceptional in the quality or quantity of articles carried, or in the mode or time of user of the road, as substantially to alter and increase the burden imposed by ordinary traffic on the road, and to cause damage and expense thereby beyond what is common." This and other statements to the same effect in the same judgment have been criticised in subsequent cases, and it may be, as was forcibly urged in the course of the arguments on behalf of the defendants, that as a definition the extract lacks precision in that it amounts to no more than a statement that extraordinary traffic is traffic that is not ordinary, and stops short of laying down any standard for ascertaining what is ordinary traffic ; but an examination of the reasoning on which the whole judgment proceeds leads, I think, to the conclusion that in a case like the present, where the frequent passage of concentrated weight is the element relied on as making the traffic extraordinary, the proper test to apply is to ascertain whether at the time of the introduction of the means of transporting this concentrated weight there was any existing traffic imposing a burden on the road comparable with it in quantity or frequency. If there was, it may well be that the new departure, although it increases the burden on the road, does not alter it and is therefore only in the nature

(1) [1893] 2 Q. B. 333, 340.

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of increased ordinary traffic; if, on the other hand, there was not any such pre-existing traffic, then the innovation is not ordinary, but extraordinary, traffic on that road.

Under this test there can be no doubt that the steam waggon traffic when first put on these roads—and to save repetition I intend to include all four roads, although for the moment I am dealing only with two of them—was exceptional and extraordinary, and I must so hold it to have been.

I think, further, it continued so to be down to the commencement of these proceedings. An elaborate census of the traffic passing along the Bristol Road during the 23 weeks between May 1 and October 23, 1916, shows that in the period mentioned over 39,200 vehicles, including 16,600 ordinary bicycles, passed the point of observation. Of the remaining 22,600 vehicles 14,780 were horse-drawn and 7818 were mechanically propelled. Considerably more than half of these 7818, namely, 4358, were quick-moving motor cycles, motor cars, and taxi cabs, and out of the remaining 3560 the defendants' waggons and trailers numbered 3213—the difference being represented by 300 covered motor vans (which may well have been in part light traffic), 14 motor omnibuses, 7 rubber-tyred motor lorries, 10 light tractors, 11 traction engines, and 5 trailers.

These figures demonstrate that the carriage of concentrated weight over the road was still exceptional, and virtually confined to the defendants, and in these circumstances it cannot, in my opinion, have ceased to be extraordinary and become ordinary traffic between 1913 and 1916.

From these findings it follows that there existed from August, 1913, conditions capable of giving rise to a claim under the statute of 1878. On February 19, 1917, the plaintiffs' surveyor certified by four certificates that extraordinary expenses within s. 23 of that statute had been incurred by reason of damage to each of the four roads, and on February 21 the writ was issued. I have so far mentioned two only of the roads—the other two will be more conveniently dealt with later on.

Before examining the figures of the plaintiffs' claim it will

be well to ascertain the nature and extent of the statutory remedy. The object of s. 23 is to ensure that a person using a highway for exceptional purposes shall pay for any damage caused thereby, but by s. 12 of the Locomotives Act, 1898, the liability is qualified by an important limitation in that the action to enforce the statutory remedy must—with certain exceptions not applicable here—be commenced within twelve months of the time when the damage was done. The true effect of this limitation is, in my opinion, that the authority can only recover in respect of so much of the damage as was done within the 12 months preceding the issue of the writ, and if the injury has been going on for a longer period it becomes necessary to ascertain how much of the expense is properly attributable to those 12 months. I think, as a result of the authorities, it may accurately be said that prima facie the measure of damage is the difference between the sum expended in repairing the particular highway during the year and the average sum expended on it in previous years, but obviously this can only be the prima facie method of ascertaining the damages, as there may have co-existed with the extraordinary traffic in respect of which the action is brought other traffic and causes contributing to the necessity for increased expenditure, and the legislature cannot be presumed to have intended to impose on the person responsible for the extraordinary traffic any liability for increased expenses due to other causes.

Bearing these principles in mind I turn to consider the plaintiffs' claim in respect of each of the four roads, and the evidence by which it is supported, and I will deal first with the Bristol Road. [His lordship then went into the details of the history of this road and the various expenses incurred for repairs from the year 1908 when it was first made up as a waterbound limestone road down to 1916, and came to the conclusion that the plaintiffs had failed to establish their right to recover 400*l.* inasmuch as the expense was largely incurred in substituting for the old waterbound limestone surface a surface of granite imported from another locality, and was not incurred by reason of the damage from the

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defendants' traffic. He ultimately awarded the plaintiffs 30*l.* in respect of their Bristol Road claim. With regard to Arundel Road, on which 992*l.* had been expended in 1916, his Lordship, after reviewing the evidence at length, continued :]

I think it is impossible to read that evidence and the pleadings and particulars without coming to the clear conclusion that substantially all the damage in respect of which expenses were incurred on this road in July, 1916, had been done prior to February 21, 1916. The plaintiffs' own case is that the road in January and February was so destroyed that it had to be completely reconstructed, and on that footing I do not see how any part of the expense incurred in that reconstruction can properly be attributed to damage done subsequent to February 21.

I pass now to the first of the two roads which I have not hitherto mentioned. [His Lordship then dealt with the facts as to Upper Church Road, and held that the claim of 420*l.* in respect thereof was excessive, and awarded the plaintiffs 210*l.*]

The fourth and last road is Park Place. It is obviously quite unsuited for the passage of the defendants' steam waggons. It is a pity they ever traversed it, and I think the defendants must pay the 40*l.* which the plaintiffs expended on restoring it after they had done so. The result is that upon this part of the action—that is to say, upon so much of the claim as is based on the Statute of 1878—I give judgment for the plaintiffs for sums amounting in the aggregate to 280*l.* The difference between the sum I have just mentioned and the 1750*l.* claimed is largely accounted for by the amount of expenditure I have attributed to damage done prior to February 21, 1916, and by paragraph 2 of the claim the plaintiffs seek to recover this amount and certain other sums expended by them on these two roads, prior to the date mentioned, as damages suffered by them by reason of nuisances caused upon the said roads by the defendants. In my opinion no case of nuisance has been made out. Except for two trifling instances of damage to motor cars spoken of by Mr. Barstow, there is no evidence to prove the allegations that either of these roads was ever a

source of danger to the public. They have been used constantly in all weathers, and long after they had been reduced to the condition when complete repair became imperatively necessary, by large numbers of persons travelling in both directions, on foot, on bicycles, and in all sorts of conveyances, and not a single accident to any person has been reported, nor has any witness come forward to say that he was ever prevented from using either of the roads by reason of its dangerous condition except Mr. Barstow; and his evidence comes to no more than this, that his chauffeur said he did not drive down Arundel Road because it was not safe so to do. The plaintiffs have wholly failed to make out their allegations of excessive speed, no authenticated instance of excess having been proved, although for many months the officials and employés of the plaintiffs were quite alive to the importance of the point, and were on the constant lookout to detect breaches of the law in this respect. The waggon and trailer, in circumstances explained by Mr. Butt, did at times carry weights in excess of the maximum, but not to any great extent, and this excess, which was always disclosed at the time to the plaintiffs or their agents, by reason of the waggon and trailer and their respective contents being weighed on the plaintiffs' weighbridge and the results recorded in their books, was never made the cause of complaint, and cannot now be relied upon to establish the alleged nuisance. I think, therefore, the action fails on this issue, and I propose, in giving judgment for the plaintiffs for 280*l.*, to order the defendants to pay the costs of the action except in so far as they have been increased by the issue raised in paragraph 2 of the prayer, and to order the plaintiffs to pay the defendants' costs so far as they have been increased by that issue, with the usual directions as to set off.

Solicitors: *Mead, Steele & Co., for William Smith & Sons, Weston-super-Mare; Joynson-Hicks, Hunt, Cardew & McDonald.*

G. M

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October 16, 17, 18, 22, 29.

LEVET *v.* GAS LIGHT AND COKE COMPANY.

[1917 L. 1408.]

Easement—Ancient Lights—Light to Doorway—Damages—Prescription Act, 1832 (2 *&* 3 *Will.* 4, *c.* 71), *s.* 3.

Sect. 3 of the Prescription Act, 1832 (2 & 3 Will. 4, c. 71), applies to windows or apertures in the nature of windows, and not to doorway openings which were primarily constructed for the purpose of being closed, and thus excluding light.

Held, therefore, that there can be no prescriptive right to light passing through an ordinary doorway when it is opened.

Action with Witnesses.

The plaintiff was the lessee and occupier of a messuage and workshop known as 80, Horseferry Road, in the City of Westminster. These premises were on the East side of a narrow passage or footway called Laundry Yard, leading from Horseferry Road on the South to Great Peter Street on the North. This passage was about $5\frac{1}{2}$ feet wide. The plaintiff had carried on the business of a wood turner upon his premises for upwards of 20 years. The defendants were the owners and occupiers of premises known as 82, Horseferry Road, on the West side of Laundry Yard, and opposite to the plaintiff's premises.

In September, 1917, the defendants acquired No. 78, Horseferry Road, on the South side of the plaintiff's premises, and in order to facilitate the carrying on of work alleged to be of national importance they erected a bridge or gangway across Laundry Yard that connected their two sets of premises. A licence approving of the erection of the bridge was obtained from the London County Council dated January 14, 1918, and it required, among other conditions, that the gangway should be allowed to be retained till six months after the declaration of peace, or until the premises ceased to be used in connection with the war, whichever should be the sooner, and that at the expiration of that period the gangway should be removed. The plaintiff alleged that this bridge materially affected the access of light to certain ancient lights—namely,

three windows and a door on the ground floor of his premises, and a window and loading doorway on the first floor, where a jib and wheel were used to haul up timber. The details as to these doors sufficiently appear from the judgment of the Court. By his statement of claim the plaintiff asked for an injunction to restrain the defendants from causing to be erected any bridge or other structure across Laundry Yard so as to darken or obstruct the access of light to his premises, or so as to interfere with the free user and working of the jib and wheel, or so as otherwise to occasion a nuisance, a mandatory injunction for the removal of the bridge, and damages.

Tomlin K.C. and *J. W. Manning* for the plaintiff.

Hughes K.C. and *Dighton Pollock* for the defendants.

Under the licence for making this bridge the defendants have to remove it within six months after the declaration of peace.

Having regard to the decision in *Colls* v. *Home and Colonial Stores* (1), the question is whether there has been a substantial interference with the plaintiff's right to light amounting to an actionable nuisance and rendering the premises substantially less convenient for carrying on of his business. The ground floor premises have always been dark. A right to access of light is claimed in respect of two doors—a ground floor door and a loading door on the first floor. There is no authority for a right of light to a door which is intended to exclude light and air. The aperture through which the light is claimed must be intended for the admission of light, and a door is not such an aperture unless it has glass panels. In Gale on Easements 7th ed., p. 290, there is a statement that "the aperture must be a definite and constant one, opened or intended for the admission of light"; and *Garritt* v. *Sharp* (2), *Scott* v. *Pape* (3), *Harris* v. *De Pinna* (4), and *Harris* v. *Kinloch & Co.* (5) are cited in support of that proposition. However, in the 9th ed. p. 290,

(1) [1904] A. C. 179.
(2) (1835) 3 Ad. & E. 325.
(3) (1886) 31 Ch. D. 554.
(4) (1886) 33 Ch. D. 238.
(5) [1895] W. N. 60.

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that statement is omitted, but the same cases are referred to. There are no cases precisely in point. The nearest are those relating to window spaces, or windows with iron shutters, or to apertures in a timber stage: *Collis* v. *Laugher* (1); *Cooper* v. *Straker* (2); *Courtauld* v. *Legh* (3); and *Harris* v. *De Pinna* (4). In *Kine* v. *Jolly* (5) it was found as a fact by Kekewich J. that there was an actionable nuisance, although he held that the room in question there was still a well-lighted room. Here it is impossible to say that an actionable nuisance has been occasioned. The plaintiff's evidence is fanciful, and the claim extravagant.

Tomlin K.C. in reply. The less light a man has the less he can afford to lose any of it. The only question is: Are the premises of the plaintiff substantially less convenient for the purposes of his business? On the evidence that is so, and there is a sensible diminution of the reflecting area. The user of the aperture of the doors for the access of light has been proved. The Prescription Act, s. 3, says nothing about windows, but deals with the right to access of light acquired by a building. We do not ask for a mandatory injunction under the circumstances, but claim damages to be assessed by the Court.

Cur. adv. vult.

October 29. PETERSON J. (after stating the position of the plaintiff's and defendants' premises, and commenting on the evidence as to facts not material to the point for which the case is reported). The question remains whether the plaintiff has any right to complain that the access of light through the two doorways has been obstructed, or, in other words, whether an owner of a house who opens an ordinary door whenever he pleases, and by this means lights the space behind the door, can claim a prescriptive right to light through the doorway. The upper door has been opened as occasion required for the purpose of admitting planks of timber, and also when the weather was favourable, and it was desired to do finishing work at the bench, for the purpose of obtaining

(1) [1894] 3 Ch. 659.
(2) (1888) 40 Ch. D. 21.
(3) (1869) L. R. 4 Ex. 126.
(4) 33 Ch. D. 238.
(5) [1905] 1 Ch. 480, 483.

additional light for the bench, but for what period it has been used for the purpose of lighting the bench is at least doubtful. The lower door was opened to afford ingress and egress, and was also frequently kept open when the weather was suitable for the purpose of admitting light to the shop, and letting dust out.

So far as the reported decisions go this appears to be the first case in which it has been contended that a prescriptive right to light can be obtained in such circumstances. Sect. 3 of the Prescription Act provides: "That when the access and use of light to and for any dwelling house, workshop, or other building shall have been actually enjoyed therewith for the full period of 20 years without interruption, the right thereto shall be deemed absolute and indefeasible." The question is whether this section applies to a doorway which has a door which is open or shut as occasion may require. It is difficult in such a case to see what is the measure of the light which has been enjoyed. If a door is at one time fully open and at another time only partially open, what is the aperture through which the light has been enjoyed, and what is the amount of light which has been enjoyed during the period of prescription? In my judgment, this is a serious objection to the right which has been claimed. I am also of opinion that the section applies to windows or apertures in the nature of windows, and not to apertures with doors in them, which were primarily constructed for the purpose of being closed, and thus excluding light. In *Tapling* v. *Jones* (1) Lord Westbury expressed the view that the section might be read as meaning "when any window of a dwelling-house, workshop, or other building shall have been actually enjoyed," showing that he considered that the access of light referred to in the section was access to a window, or an aperture in the nature of a window. The cases all deal with rights, or alleged rights, to lights in connection with windows or apertures constructed for the purpose of admitting light, and no one before this case appears to have suggested that if an ordinary door is left open from time to time as, and when,

(1) (1865) 11 H. L. C. 290, 305, 306.

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the owner thinks fit, during the period of 20 years, the doorway becomes an ancient light. The result, according to the plaintiff's contention, would be surprising. For example, if the door of a scullery or kitchen were left open in fine weather, in order to obtain fresh air, a prescriptive right to the access of light through the doorway would be obtained.

I am of opinion that the plaintiff's contention is erroneous, and that he has not acquired any rights to the access of light through the two doorways in question.

[The Court proceeded to assess damages for the proved obstruction of window lights.]

Solicitors: *Bartlett & Gregory; Monier-Williams, Robinson & Milroy.*

G. M.

ASTBURY J. 1918 *October* 15.

In re MEUX'S BREWERY COMPANY, LIMITED.

[1918 M. 065.]

Company—Reduction of Capital—Right of Debenture Holders to object—No Diminution of Liability as to unpaid Capital and no Payment to any Shareholder of any paid-up Capital—"Any other Case if the Court so directs"—Confirmation of Petition—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 46, 49.

Prima facie creditors are not concerned in any question of the reduction of capital where it does not involve the diminution of any liability in respect of any unpaid-up capital or the payment to any shareholder of any paid-up capital; and though by the terms of s. 49 (1.) of the Companies (Consolidation) Act, 1908, the Court may in any other case allow a creditor to object to a reduction, where no such diminution is about to take place it is incumbent on the creditor to make out a strong case before any such direction should be given.

The company was incorporated with a fully paid share capital of 1,000,000*l.*, in addition to which it had issued 1,000,000*l.* perpetual debenture stock secured by certain trust deeds constituting a floating security. In 1904 the company had incurred losses amounting to upwards of 800,000*l.*, since which year no dividend had been declared, the profits in each year being applied in reduction of the deficiency, which now amounted to 640,000*l.* or upwards. In 1917, by special resolution, the company resolved to reduce its capital to 360,000*l.* by writing off the lost capital. The reduction did not involve the diminution of any liability in respect of any unpaid capital or the payment to any share-

holder of any paid-up capital. This petition by the company to confirm the special resolution was opposed by certain holders of debenture stock on the ground that the proposed reduction would be prejudicial to their security by enabling the company to pay dividends out of profits instead of such profits being applied in making good the lost capital. The assets according to the latest balance sheet exceeded the amount of the debenture debt by 500,000*l.* and upwards. No evidence was adduced to show what part of the lost capital was attributable to circulating capital.

Held, that the holders of the debenture stock were not entitled to object to the reduction.

PETITION.

The company was incorporated in the year 1888, its objects being to acquire the business of brewers then carried on by Meux & Company, Limited, at the Horse Shoe Brewery, London, and to adopt a certain agreement for the sale and purchase thereof, and (inter alia) to acquire by purchase, leave, or otherwise any hereditaments suitable or convenient to be held with the other property of the company, with power to sell or otherwise deal with the real and personal estate of the company.

The capital of the company was 1,000,000*l.*, divided into 50,000 preference shares of 10*l.* each, carrying a fixed preferential and cumulative dividend at the rate of 5 per cent. per annum, and ranking on the assets in priority to the ordinary shares, and 5,000 ordinary shares of 100*l.* each, all of which had been issued and fully paid up.

Article 46 of the articles of association empowered the company from time to time, by special resolution, to reduce its capital by paying off capital or cancelling capital which had been lost or was unrepresented by available assets.

Article 107 (7.) empowered the directors, before recommending any dividend, to set aside out of the profits of the company such sums as they thought proper as a reserve fund, and to employ the same in the business of the company.

Article 114 provided that profits should be applicable, first, to the payment of cumulative preferential dividend on the preference shares; secondly, to the payment of a dividend on the ordinary shares; and thirdly, the balance be dealt with as the company in general meeting should determine.

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Article 118 provided that no dividend should be payable except out of the profits of the company.

The company had issued 600,000*l.* 4*l.* per cent. perpetual debenture stock secured by a trust deed dated September 20, 1888, constituting a charge by way of floating security upon the undertaking, revenue, and real and personal property of the company, present and future. The company thereby reserved power until the power of entry or sale thereby conferred should be exercised by the trustees to carry on and exercise its business, and to sell, exchange, or lease any property thereby charged, with or without the consent of the trustees, and thereby covenanted to replace any freehold or leasehold property so sold or exchanged by other property of equal value, or apply the proceeds in the purchase or redemption of the debenture stock or carry the same to a reserve fund for that purpose, or to apply the same to the other purposes therein mentioned which were further determined and defined by a subsequent supplemental deed. On default in payment of interest or in other events therein mentioned the trustees were empowered to enter on, and take possession of, the premises charged, and sell, call in, and convert the same into money upon the trusts in the said deed declared. The first schedule to the said deed gave the company an option on or after August 1, 1910, to redeem the stock at the rate of 108*l.* for every 100*l.* of the nominal amount thereof. In 1905 the company made a further issue of 400,000*l.* 6*l.* per cent. perpetual debenture stock, redeemable at the option of the company on or after December 31, 1915, at the rate of 105*l.* for every 100*l.* of the nominal amount thereof. This issue ranked after the 600,000*l.* stock, and was secured by a trust deed dated June 16, 1905, constituting a similar floating charge upon the property of the company, and containing substantially similar provisions to those contained in the former trust deed and supplemental deed.

No interest was in arrear, and no other default had been made by the company under these trust deeds. The whole of the debenture stock was still outstanding.

In the year 1904 the company had incurred losses amounting

to upwards of 800,000*l.* The last dividend on the preference shares was paid on July 31, 1904, since which date no dividend had been paid down to the present time, the annual profits in each year having been applied in reduction of the deficiency shown on the capital account.

The balance sheet annexed to the directors' report made up to December 31, 1905, showed, in round figures, liabilities amounting to 2,086,057*l.*, and assets amounting to 1,280,190*l.*, leaving a deficiency of 805,867*l.* The assets included in round figures: Interests in freehold, leasehold, copyhold, and other properties, equities of redemption, and loans and advances on mortgages, 1,150,535*l.*; debtors, &c., 33,980*l.*; stock of malt, &c., 23,137*l.*; investments, nil; cash at bank and in hand, 72,537*l.*

The balance sheet annexed to the directors' report, made up to December 31, 1917, showed in round figures liabilities amounting to 2,225,971*l.*, and assets amounting to 1,584,962*l.*, leaving a deficiency which after deducting 67,513*l.*, the amount of the profit earned during the current year, left a net deficiency of 641,009*l.* The assets included in round figures: Interests in freehold, leasehold, copyhold, and other properties, equities of redemption, and loans and advances on mortgage, 1,233,899*l.*; debtors, &c., 95,080*l.*; stock of malt, &c., 48,891*l.*; investments, 31,744*l.*; cash at bank and in hand, 175,345*l.*

By special resolution, duly passed and confirmed on May 13, 1918, and May 28, 1918, respectively, it was resolved (1.) that the capital of the company be reduced from 1,000,000*l.* (divided as aforesaid) to 360,000*l.*, divided into 5000 ordinary shares of 2*l.* each, and 50,000 preference shares of 7*l.* each, and that such reduction be effected by cancelling capital which has been lost or is unrepresented by available assets to the extent of 98*l.* per share upon each of the ordinary shares, and of 3*l.* upon each of the preference shares in the company's capital, and by reducing the nominal amount of the said shares accordingly; and (2.) that article 114 of the articles of association be cancelled, and that the following be substituted—viz., that the preference shares shall confer on the holders thereof the right to a fixed cumulative dividend of

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10*s.* per share, and in addition the sum of 7*l.* per share in respect of past cumulative dividends thereon unpaid up to July 31, 1918, with certain other provisions as therein stated.

The petition stated that prior to the passing of the resolution paid-up capital to the extent of 640,000*l.* and upwards had been lost or was unrepresented by available assets; that the reduction of capital aforesaid did not involve either diminution of any liability in respect of unpaid capital or the payment to any shareholder of any paid-up capital, and prayed that the reduction of capital might be confirmed by the Court.

The Consolidated Trust, Limited, as the holder of a large amount of debenture stock, opposed the petition on the ground that the proposed reduction would be prejudicial to the holders of the debenture stock, inasmuch as the reduction of capital by writing off losses would enable the company to pay dividends out of future profits instead of such profits being applied in making good the losses sustained by the company.

Maugham K.C. and *Sir M. Denham Warmington* for the company. The general power to reduce capital is conferred by s. 46 of the Companies (Consolidation) Act, 1908 (1), and by s. 49 (1.) creditors are only entitled to object to the proposed reduction of capital if it involves either the diminution of any liability in respect of unpaid capital or the payment to

(1) The Companies (Consolidation) Act, 1908, s. 46 (1): "Subject to confirmation by the Court, a company limited by shares, if so authorized by its articles, may by special resolution reduce its share capital in any way, and in particular (without prejudice to the generality of the foregoing power) may . . . .

(b) "Either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share capital which is lost or unrepresented by available assets"; . . . .

Sect. 49 (1): "Where the proposed reduction of share capital involves either diminution of liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, and in any other case if the Court so directs, every creditor of the company who at the date fixed by the Court is entitled to any debt or claim which, if that date were the commencement of the winding up of the company, would be admissible in proof against the company, shall be entitled to object to the reduction."

any shareholder of any paid-up capital "or in any other case if the Court so directs." Notwithstanding these words there is no authority for allowing debenture holders to object to the reduction where no diminution is about to take place such as is expressly mentioned in s. 49 (1.), though similar resolutions have over and over again been confirmed by the Court. Admitting, however, that the Court has power under s. 49 (1.) to allow any creditor to object to a reduction in any other case besides the two cases specifically mentioned in that sub-section, there is nothing in the circumstances of the present case which entitles the respondents to raise this objection even if any part of the lost capital can be properly attributed to circulating as opposed to fixed capital. The debenture debt is amply secured, and it would be a great hardship on the company if the future annual profits are to be applied in wiping out the whole of the lost capital before resuming the payment of dividends. We contend that the holders of debenture stock have no locus standi at all to oppose this petition: *Poole* v. *National Bank of China* (1), and that in any case they have shown no reason why the resolution in this particular case should not be confirmed by the Court.

Clayton K.C. and *H. E. Wright* for the respondents. The right of a creditor to object to the proposed reduction is not limited to the two cases specifically mentioned in s. 49 (1.). The terms of s. 49 (1.) give the creditor a right to object "in any other case if the Court so directs." The present case is one of the character indicated by that language. The resolution, if confirmed, will have the effect of enabling the company to pay future dividends to the shareholders without making good the lost capital as far as it is attributable to circulating capital. The necessity of making good lost capital so far as it is due to the loss of circulating capital is discussed in *Verner* v. *General and Commercial Investment Trust* (2); *Ammonia Soda Co.* v. *Chamberlain* (3); *Lawrence* v. *West Somerset Mineral Ry. Co.* (4); *In re Hoare & Co.* (5). The reduction in the present case will have the effect of diminishing

(1) [1907] A. C. 229.
(2) [1894] 2 Ch. 239.
(3) [1918] 1 Ch. 266.
(4) [1918] 2 Ch. 250.
(5) [1904] 2 Ch. 208.

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the security of the debenture stock holders by the amount distributed as future profits. The purchase and sale of public-house property are comprised in the objects of the memorandum of association, and the freehold and leasehold properties possessed by the company are in the nature of circulating capital.

[ASTBURY J. There is no evidence on which I can conclude that the loss here was attributable to circulating capital.]

Moreover, the assets stated in the balance sheet are of a speculative character, rendering it unsafe to rely on the estimated margin of the debenture holders' security, which depends on a variety of circumstances.

[ASTBURY J. Can you find any case in which debenture holders have been given leave to appear and object to such a reduction ?]

There appears to be no direct authority on the point, but the note in Buckley on Companies, 9th ed., p. 144, contemplates a case like the present.

[They also referred to rule 6 of the General Order of May, 1909, on the procedure on applications for confirmation by the Court.]

Maugham K.C. in reply.

ASTBURY J. This is a petition by the company asking that a reduction of capital, which is the subject of the special resolution set out in the petition, may be confirmed by the Court. The petition is opposed by certain holders of perpetual debenture stock issued by the company, and the particular objection taken on their behalf is, so far as authority is concerned, of a novel character.

The original capital of the company was 1,000,000*l.*, divided into 50,000 preference shares of 10*l.* each, carrying a fixed preferential and cumulative dividend at the rate of 5 per cent., and having priority in a winding up as to capital, and 5000 ordinary shares of 100*l.* each. The company has, by its constitution, the usual power to reduce its capital, and by the special resolution in question now proposes to reduce its capital from 1,000,000*l.* to 360,000*l.*, divided into

5000 ordinary shares of 2*l.* each and 50,000 preference shares of 7*l.* each, such reduction to be effected by cancelling 98*l.* on each fully paid ordinary share and writing off 3*l.* on each fully paid preference share. The resolution then provides for the manner in which the profits of the company, subject to the right of the directors under the articles of association to carry the same to a reserve fund, shall be dealt with in each year. These provisions are exceptional, but are not relevant to the objection now taken on the behalf of the debenture stock holders, and therefore I do not propose to discuss them further.

At the end of the year 1905 the company appears, from its balance sheets, to have lost a capital sum of 805,866*l.*, and it has since that date devoted its annual profits to the reduction of this capital deficiency, with the result that at the end of the year 1917 the capital loss had been reduced to 641,000*l.* In 1904 the directors had the freehold, leasehold, and other properties of the company, including properties held by way of security and loans, valued by a firm of valuers, and in the balance sheet at the end of the year 1905 they stood at the value of 1,150,535*l.* Those properties, or similar properties now in the possession of the company—which have been to some extent revalued—are said to-day to be worth the sum of about 1,200,000*l.*; in other words, there has been a slight increase in the capital value of those assets. With regard to the more obviously circulating capital, such as debtors, stock, investments, and bank balances, there has been a large increase in the total amount of that class of assets between the years 1905 and 1917. It is quite obvious from the evidence that this company has lost at least the amount of money by which it is proposed to reduce its capital. There are 1,000,000*l.* perpetual debenture stock outstanding; 600,000*l.* part thereof carries interest at 4 per cent., and 400,000*l.* part thereof carries interest at 6 per cent., and it is on behalf of certain holders of this debenture stock that the proposed reduction of capital is now opposed. Under s. 46 of the Companies (Consolidation) Act, 1908, a company, subject to confirmation by the Court, may, if so authorised

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by its articles, reduce its capital in any way, and in particular in the manner set out in the section. Sect. 49 (1.) enacts: "Where the proposed reduction of share capital involves either diminution of liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital"—which is not the case here—"and in any other case if the Court so directs," the creditors shall be entitled under the provisions contained in this section to object to the reduction. It is argued on behalf of the debenture stock holders that this is a case in which the Court ought to exercise its discretion by directing that, notwithstanding the fact that no diminution of liability or repayment to shareholders is involved, the creditors should still have the right to come in and object to this reduction. This is from one point of view a very startling proposition. The Court has made hundreds of similar orders from time to time, and there appears to be no authority in the books, and no record of any unreported case, in which debenture holders have successfully or otherwise been permitted to oppose a reduction of capital which does not involve a reduction of unpaid share capital or a repayment of paid-up share capital to shareholders. I think it is quite clear from s. 49 (1.) that there is power in the Court to permit a creditor to object to a reduction where no such diminution of assets is about to take place, but from the framing of the section, and after considering the observations of Lord Macnaghten in *Poole* v. *National Bank of China* (1), I think that I am at least right in saying that prima facie creditors are not supposed to be concerned in these questions of reduction of capital where no diminution of unpaid capital or repayment to shareholders of paid-up capital is involved; in other words, if the Court is to allow a secured creditor in particular to object to a reduction which does not involve such a diminution of assets as is referred to in s. 49 (1.), it is at least incumbent on him to make out a strong case before such a direction would be given. Now, if I understand it rightly, the argument which has been addressed to me on behalf of the respondents really comes to

(1) [1907] A. C. 229, 239.

this, that the company is proposing to wipe off a debit on capital account which must include a substantial sum of floating or circulating capital—in other words, the company is proposing to put itself in a position which will enable it to pay a dividend out of its annual profits without making good such portion of its lost capital as is properly attributable to floating or circulating capital, whatever may be the true meaning of that term. There must have been hundreds of cases in which the Court has sanctioned a reduction of capital not involving a diminution of assets of the character referred to in s. 49 (1.), in which exactly the same argument could have been used; and in this particular case, assuming that it is open to the Court to consider this argument and discuss whether or not these debenture stock holders should be given a locus standi to object, it must be borne in mind that the evidence from the balance sheets appears to show that there is more than 1,500,000*l.* worth of assets in the possession of the company against a debenture debt of 1,000,000*l.*, and there is no evidence of any sort or kind to show that the assets are an insufficient security or that this secured debt is at the present time in any jeopardy as compared with the position in which it has been since the year 1905. The debenture stock was taken by the holders with knowledge that the company had the statutory right to reduce its capital on going through the proper procedure, and there is no provision, as there might have been, in the trust deeds in any way protecting the debenture stock holders against the passing and confirming by the company in the ordinary way of a resolution for the reduction of lost capital. It is impossible for me on this evidence to decide that the present loss includes circulating capital at all. The capital lost has been replaced by some 200,000*l.* since 1905, and for all I know the remaining loss may be wholly attributable to fixed assets; but this at least is clear, that there is no evidence adduced on behalf of the debenture stock holders that this company is contemplating the payment of future dividends in any way to which the debenture stock holders are entitled to object.

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Under these circumstances I think the opposition fails, and there must be an order on the petition as prayed.

Solicitors for petitioner: *Hunter & Haynes.*
Solicitors for respondents: *Davidson & Morriss.*

A. C.

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[1913 G. 826.]

Will—Administration Action—Assignment by Way of Mortgage of Plaintiff Beneficiary's Interest before Action—Notice to Trustees—Personal Liability of Plaintiff for Costs—Priority between Costs and Mortgage—Mortgagee standing by.

The claim of an assignee under an assignment by a beneficiary of an interest in a trust fund, the assignor not being a trustee of the fund and the assignment being duly notified to the trustee, has priority over a claim by the trustee against the assigned interest for a debt incurred by the assignor to the trustee since the assignment.

Irby v. *Irby* (No. 3) (1858) 25 Beav. 632 and *Stephens* v. *Venables* (No. 1) (1862) 30 Beav. 625 followed.

Dictum of Hall V.-C. in *In re Knapman* (1881) 18 Ch. D. 307 distinguished.

But the assignee will lose his priority if he stands by, *e.g.*, in an action by the assignor against the trustee for an account, and allows the debt, *e.g.*, costs payable by the assignor to the trustee, which he could have prevented, to be incurred.

Before action brought the plaintiff had assigned, by way of mortgage, her interest under a will, and the assignment had been duly notified to the trustees. In the action she claimed against the trustees as account, their removal, and cancellation of a receipt given by one of them not in his character of trustee. The claim to cancel the receipt was struck out, and the claim to remove the trustees was dropped. An account was delivered, but the plaintiff was not satisfied. The Court refused to proceed till the mortgagees were brought before the Court, and the plaintiff added them as defendants. They intimated that they would not file evidence. It appearing that any account was unlikely to result in any advantage to the plaintiff, the Court made an order at her peril as to costs, the mortgagees not objecting or remonstrating and attending the subsequent proceedings. The account was taken, the Master certifying that nothing whatever was due from the trustees.

Held, that, but for their standing by, the mortgagees would have been entitled to have the trustees' costs, so far as the plaintiff was

personally liable, charged upon her interest under the will subject, and not in priority, to their mortgage.

But that, having been silent throughout, their security became subject to the suit, and whatever sum was charged upon the plaintiff in respect of costs incurred subsequent to the order for an account was chargeable on her interest under the will in priority, and not subject, to their claim.

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SUMMONS.

The facts were stated by Younger J. substantially as follows :—

The action was commenced by writ on May 7, 1913, by Mrs. Gustavson as sole plaintiff against Mrs. Haviland and Edmund Henry Baker as defendants. It was for an account, removal of the defendants as trustees of the will of the testator W. H. B. Pain, who died on September 12, 1899, and the cancellation of a receipt given by the plaintiff to the defendant Baker in his character not of trustee, but of one who had advanced money to Mrs. Gustavson on the security of her interest under the will. It was continued in its preliminary stages till June 14, 1915, the pleadings being amended and re-amended. The defendant Baker, who, when the writ was issued, was of weak mind, died on July 2, 1914. The action was continued against Rodney Cranston Baker, his brother and legal personal representative. He put in a defence on December 3, 1914. On December 14, 1914, the claim to set aside the receipt was struck out. In October, 1914, the claim to remove the trustees had been dropped. The action thus became one for an account only, which might have been commenced by originating summons. In the meantime the trustees prepared, and on July 23, 1913, delivered, accounts to the plaintiff. These were investigated by an accountant on her behalf. His report was full of criticism as to the form and sufficiency of the accounts, and the plaintiff, not being content with them, on May 21, 1914, took out a summons asking that the account be taken by the Court. That summons came on before Sargant J. on February 22, 1915. It then transpired that the plaintiff had, some time before action brought, assigned her interest under the will to a Mrs. Spencer and to the Middlesex Reversionary Investment Co. by way of mortgage, and that the assignments had been duly notified

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to the trustees. Sargant J. accordingly refused to proceed further with the summons until the plaintiff had brought her assignees before the Court. He directed the summons to stand over, giving the plaintiff leave to amend. This she did by making Mrs. Spencer and the Investment Co. defendants. The summons for an account was also amended by being addressed to the added defendants. They, on March 24, 1915, appearing by the same solicitor, informed the Master that they would rely on the evidence filed, and did not propose to file any of their own; and the summons then came before Younger J. on May 18, 1915. It then appeared, on a consideration of the evidence, that the account asked for was unlikely to result in any advantage to the plaintiff: her interest was merely a life interest in a moiety of the testator's residue—never a large fund: her accountant's report offered no real ground for supposing that the trustees' accounts were anything more than unusual in form and deficient in detail; they afforded little ground for supposing that they were in the result incorrect. The action, so far, having produced the accounts, the plaintiff's personal liability for costs had not then become serious, while its further prosecution, if fruitless, might, on the mere ground of expense, be disastrous to the plaintiff. Accordingly, Younger J. again adjourned the summons in order that the accountants on either side might meet to see whether the outstanding items could not be adjusted, the plaintiff to produce any particulars she might have to assist the trustees in dealing with the points raised. But to no purpose. On June 14, 1915, it was intimated to Younger J. that the plaintiff's advisers had not been satisfied, and she still pressed for an account. The trustees still objecting, Younger J. required, as a condition of an order, that the plaintiff's adult children, entitled to three-tenths of the fund in remainder, should join her, as they were said to be willing to do, as co-plaintiffs. He then made an order for the account, expressly reserving all the costs and intimating that the order was taken, and the proceedings continued, at the peril of the plaintiffs as to all costs. The defendant mortgagees in no way opposed the order for an

account. They stood by, and allowed it to be made without objection or remonstrance. The account so directed had now been taken in Chambers. The other parties interested in the estate had been served with the order, and had attended the proceedings, extending over nearly three years, and on March 12, 1918, the Master made his certificate, showing that on the accounts nothing whatever was due from the trustees.

The question now was how the costs were to be borne.

H. Terrell K.C. and *Lavington* (for *John Beaumont*, serving with His Majesty's Forces) for the trustees. The costs payable by the plaintiff should be charged upon her interest under the will in priority to the claims of her mortgagees: *In re Knapman* (1); Ingpen on Executors, 2nd ed., pp. 603, 604. Every person who takes an assignment, whether by mortgage or otherwise, of a share in the hands of a legal personal representative, must take subject to the settlement of accounts as between the assignor and the legal personal representative. It makes no difference that the assignor is a mere legatee and not also trustee.

Barrett-Lennard for the plaintiff. If what Hall V.-C. says in *In re Knapman* (1) is correct, it covers this case. Trustees cannot by any act of the cestui que trust be deprived of their right to go against that which is part of the trust estate.

C. Church for the assignees. The mortgagees have priority. It is a question which of two innocent parties is to suffer. After an assignee has given notice of his assignment to the trustee the trustee can, as against the assignee, create no new charge: W. & T. L. C., 8th ed., vol. 1, pp. 144–5; Lewin on Trusts, 12th ed., p. 894. *Stephens* v. *Venables* (No. 1) (2) is a very clear authority. The trustees cannot in any way attack the assignees.

W. H. Horsley for the defendant Baker and a party attending.

H. Terrell K.C. in reply. The point is of general interest. If a person entitled to a share of a trust fund mortgages his share and afterwards becomes indebted to the trust fund—

(1) 18 Ch. D. 300, 307. (2) 30 Beav. 625.

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i.e., to the trustee as trustee of the fund—then, when the fund comes to be distributed, is the mortgagee entitled to say: You, the trustee, are not entitled to take that indebtedness into account as against the mortgaged share; you must pay me my share without bringing into account as against the share the liability of the cestui que trust to you? Or is the trustee entitled to say: You, the mortgagee, are in no better position than your mortgagor would have been in had he not mortgaged his share? Where a cestui que trust mortgages an equitable chose in action, the subject-matter of the mortgage is simply what, as between the cestui que trust and the trust fund, the cestui que trust may ultimately get. That is the meaning of a mortgagee of an equitable chose in action taking "subject to all equities." All that on distribution the cestui que trust is entitled to receive is what the mortgagee takes, and that only: *In re Rhodesia Goldfields.* (1) The mortgagee takes what remains "after all equities between him and the estate have been settled": *Willes* v. *Greenhill* (No. 1). (2) What Hall V.-C. says in *In re Knapman* (3) is sufficient to establish the trustees' case. *In re Hervey* (4) is on all fours. The assignee takes "subject to the possibility of an equity to be asserted against him" in the future. The assignee only gets what the assignor is entitled to receive when the period of distribution comes—an unascertained sum when the assignment is made: *Morris* v. *Livie.* (5)

[YOUNGER J. I am not at all sure that the action was not defective, seeing that it was constituted from the beginning without making the mortgagees plaintiffs; and if they, being defendants, stood by and let the proceedings go on, can they now object to the costs being paid out of their mortgagor's interest?]

No. On that ground of approbation, as well as upon the principles enunciated above, the trustees are entitled to succeed.

C. Church (on the question of approbation). It is not a mortgagee's duty to suggest that his mortgagor's action is

(1) [1910] 1 Ch. 239, 246.
(2) (1860) 29 Beav. 376.
(3) 18 Ch. D. 307.
(4) (1889) 61 L. T. 429
(5) (1842) 1 Y. & C. Ch. 380, 387.

ill founded. The mortgagor has the equity of redemption in him. For this purpose there is no difference between an assignee by way of mortgage and an assignee out and out. The mortgagees here were unnecessary parties all through. Their conduct has been perfectly regular.

[*Read* v. *Brown* (1), *Bolton* v. *Curre* (2), *In re Jones* (3), *Doering* v. *Doering* (4), *In re Exhall Coal Co.* (5), *Government of Newfoundland* v. *Newfoundland Railway Co.* (6), *Wilkins* v. *Sibley* (7), *Van Gelder, Apsimon & Co.* v. *Sowerby Bridge United District Flour Society* (8), *In re Dacre* (9), and *In re Walters* (10) were also referred to in the course of the arguments.]

Cur. adv. vult.

July 16. YOUNGER J. This is the last act of an unfortunate and most protracted litigation. [His Lordship stated the facts, and continued]: The accounts delivered during the proceedings are in the long last shown to be correct, and the action subsequent to their delivery has been entirely fruitless of anything except inordinate expense. The result is deplorable, but it is only right to say that it is due entirely to the parties themselves or to some of them. The Court is free from all responsibility. If its advice had been taken all the proceedings in Chambers would have been spared. No trial is now asked for. There is nothing to try. All that has to be done is to determine how all this expense is to be borne; and, on the footing that some part, at least, of the costs must in the result fall upon the plaintiff Mrs. Gustavson personally, the important question has been argued whether such costs are chargeable upon her interest under the testator's will in priority to the claims thereon of Mrs. Spencer and the Investment Co. as her assignees, or whether they are so charged upon her interest subject to these incumbrances. Mr. Terrell, for the trustees, claimed that the costs must rank

(1) (1888) 22 Q. B. D. 128.
(2) [1895] 1 Ch. 544, 548.
(3) [1897] 2 Ch. 190.
(4) (1889) 42 Ch. D. 203.
(5) (1866) 35 Beav. 449.
(6) (1888) 13 App. Cas. 199.
(7) (1863) 4 Giff. 442, 445.
(8) (1890) 44 Ch. D. 374, 389.
(9) [1916] 1 Ch. 344.
(10) (1888) 58 L. T. 101.

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in priority to the claims of the assignees, on the broad ground that the trustees were entitled, irrespective of any assignment by the plaintiff, to retain out of every original interest of hers under the will of the testator any sum which, before distribution, became payable by her to them as trustees, and that whether the assignment was absolute or by way of mortgage, whether it was made before or after the liability was incurred, whether, if the liability was in respect of the costs of an action against trustees, the assignees were parties to the action or not. The contention, so broadly stated, was supported by an elaborate examination of the authorities. If well founded, it seriously discounts the eligibility, as securities, of interests on which large sums of money are constantly being advanced. The propositions, now formally contended for, accordingly demand careful consideration.

I may say at once that, excepting some observations by Hall V.-C. in a case to which I will refer later, I can find no authority which supports these propositions, while the contrary view is assumed, if not always stated, in many judgments delivered even before the Judicature Acts. Since s. 25 of the Judicature Act of 1873 was passed, it is difficult to see how the contention is tenable with regard to assignments falling within it and not being assignments by trustees. And the assignments in the present case do fall within that section; for, although prior to that Act the interest of the plaintiff in this case, being properly recoverable only in a Court of Equity, was strictly "a chose in equity," not cognisable in a Court of Law, the expression in the section "legal choses in action" includes choses in equity within its scope. These, since *King* v. *Victoria Insurance Co.* (1)—although the Privy Council decision there merely indicated negative approval of a view of the Colonial Court on an analogous Colonial statute—have been treated as including "all rights the assignment of which a Court of Law or Equity would before the Act have considered lawful"; or, in the words of Channell J. in *Torkington* v. *Magee* (2), as including a "debt or right which the common law looks on as not assignable

(1) [1896] A. C. 250, 254. (2) [1902] 2 K. B. 427, 430-1.

by reason of its being a chose in action, but which a Court of Equity deals with as being assignable."

And the effect of a duly notified assignment to which the section applies, and, be it noted, whether by way of mortgage or absolutely, is no longer in doubt. I need for that purpose refer only to passages from two judgments, both of the Court of Appeal. The first is *Read* v. *Brown*. (1) There Lord Esher M.R. says: "In construing s. 25, sub-s. 6" of the Judicature Act, 1873, "we must adopt the ordinary rule as to the construction of Acts of Parliament, that of giving, if possible, a meaning to each word. Now the defendant's argument comes to this, that the 'legal right' to a debt is the same thing as the 'legal and other remedies' for it; but if that is a correct argument, the provision that the assignment shall transfer 'the legal right to the debt' is mere tautology, and the section must be read as if the words were not there. That is a wrong rule of construction; the words mean what they say; they transfer the legal right to the debt as well as the legal remedies for its recovery. The debt is transferred to the assignee and becomes as though it had been his from the beginning; it is no longer to be the debt of the assignor at all, who cannot sue for it, the right to sue being taken from him; the assignee becomes the assignee of a legal debt and is not merely an assignee in equity, and the debt being his, he can sue for it, and sue in his own name. We must give that meaning to the language of the sub-section." The second is *Durham Brothers* v. *Robertson*. (2) There Chitty L.J. says: "Where the Act" (the Judicature Act, 1873) "applies, it does not leave the original debtor in uncertainty as to the person to whom the legal debt is transferred; it does not involve him in any question as to the state of the accounts between the mortgagor and the mortgagee. The legal right is transferred, and is vested in the assignee. There is no machinery provided by the Act for the reverter of the legal right to the assignor dependent on the performance of a condition; the only method within the provisions of the Act for re-vesting in the assignor the legal right is by a

(1) 22 Q. B. D. 128, 132 (2) [1898] 1 Q. B. 765, 773.

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re-transfer to the assignor followed by a notice in writing to the debtor, as in the case of the first transfer of the right. The question is not one of mere technicality or of form : it is one of substance, relating to the protection of the original debtor and placing him in an assured position." In the face of these judgments of the Court of Appeal it can, in my opinion, not be open to doubt that, after assignment notified to the trustees as provided by the section, the assignee must be quite unaffected by any debt thereafter incurred by the assignor to the trustees.

But I do not find that in such a case as the present the result would in a Court of Equity prior to the Judicature Acts have been different. There is, of course, no question here of depriving a trustee of his right to indemnity out of the entire trust fund for all costs, charges, and expenses properly incurred by him in relation to his trust. That right is paramount to every beneficial interest in the trust fund, and is unaffected by any dealing by any cestui que trust with his interest. See *In re Exhall Coal Co.* (1), cited by Mr. Terrell. The right here claimed for the trustee is very different. It is the right, after assignment of a share duly notified to him, and in respect of a debt incurred by the assignor to the trust after assignment, to recoup himself out of the assignee's interest and in relief of the entire trust fund.

Now, at this point, it is convenient to distinguish the case where the assignor is himself a trustee from the case where he is not. In the former case his share in the hands of an assignee does remain liable for any default or indebtedness of his even in respect of a breach of trust committed after assignment. The reason for this is differently stated. One view is that the trustee is treated as having received his share by anticipation. "You have been paid," the Court says to him ; "you have your share in your hands." See *In re Dacre.* (2) But another explanation, given by Knight Bruce V.-C. in *Morris* v. *Livie* (3), is perhaps preferable, although somewhat refined, because it is appropriate to

(1) 35 Beav. 449.
(2) [1916] 1 Ch. 344.
(3) 1 Y & C. Ch. 380, 388.

every kind of indebtedness by the trustee from whatever cause arising, including, for instance, compensation for a breach of trust from which he may personally have derived no advantage whatever. In that case the Vice-Chancellor says this: "It may, I conceive, be properly said, that Mr. R. Livie's legacy was given under a condition raised and implied by law, that (sic) undertaking he should duly fulfil the duties and obligations imposed on him by the instrument giving it. This he could not do without performing the trust as to the stock legacy, which, before his own legacy became due, he had, by his own misconduct, disabled himself from performing. The condition, if existing, accompanied his legacy until its discharge, and applied to it as much after as before its assignment."

But, as was said in *Hopkins* v. *Gowan* (1), "If an executor misconduct himself, so that when the accounts are finally wound up, he is subject to costs, the assignee of his legacy must bear the consequence. The distinction between such a case and the common case of assignment with notice, is very obvious." And the distinction is made very apparent by *Irby* v. *Irby* (No. 3) (2), in which it was held that, while where an assignor is trustee at date of assignment his share remains liable for his subsequent default notwithstanding assignment, it is otherwise when the assignor becomes executor or trustee after assignment takes place, "for in such case no equity arises in respect of a debt subsequently incurred," 1 W. & T. L. C., 8th ed., p. 144. In my opinion, this case, which has never, so far as I can find, been questioned, is really conclusive of the matter. For the share of an assignor who never becomes a trustee can, in this respect, be in no worse case than the share of an assignor who does.

There is, however, other authority to the same effect. I will content myself with the following passage in *Stephens* v. *Venables* (No. 1) (3): "All rights of set-off and adjustment of equities between the legatee and the executor already existing at the date of the notice

(1) (1828) 1 Moll. 561, 562. (2) 25 Beav. 632.
(3) 30 Beav. 625, 627.

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have priority over the charge, and may properly be deducted from the amount coming to the mortgagee; but the trustees can create no new charge or right of set-off after that time. . . . . No debt which accrued due subsequently to that period can be allowed to work any deduction from the share charged to the mortgagee." *Stephens* v. *Venables* (No. 1) (1) was in 1862.

Now, the only statement to the contrary of all this that I can find is to be found in the judgment of Hall V.-C. in *In re Knapman.* (2) In that case the Vice-Chancellor said this: "It seems to me to be not going further at all in principle than the ordinary case, which is that every person taking an assignment from a cestui que trust of a portion of the testator's estate, at all events takes it subject to the liability to make good all breaches of trust on the part of the assignor if he fill the fiduciary position of a trustee, even though the breaches of trust be subsequent to the assignment, as in *Morris* v. *Livie* (3), and cases of that class. They take subject to all those risks. I think they must, upon an analogous principle, take subject to the risk of the legacy assigned not being properly payable to the extent to which the legatee is liable to make good to the estate expenses incurred in an administration of the estate, that is, the loss occasioned to the estate by reason of expenses incurred in the administration of the estate by " (meaning thereby, I think, through the action of) "the residuary legatee." Now, neither *Hopkins* v. *Gowan* (4) nor *Irby* v. *Irby* (No. 3) (5), nor any case like *Stephens* v. *Venables* (No. 1) (1), was cited to Hall V.-C. It is true that *Morris* v. *Livie* (3) was present to his mind, but if these other cases had been drawn to his attention it seems to me impossible that he could have said the position of the assignee of a trustee was in any way analogous to that of the assignee of a beneficiary. There is, in my judgment, no analogy at all between the two when the assigned reason for the position of the trustee's assignee is remembered.

(1) 30 Beav. 625, 627.
(2) 18 Ch. D. 300, 307.
(3) 1 Y. & C. Ch. 380.
(4) 1 Moll. 561.
(5) 25Beav. 632.

Further, it may be noted that the observations of Hall V.-C. were not necessary to the decision of the case. The assignment there had taken place during the pendency of the probate proceedings in which the costs payable by the assignor had been incurred, and that was the ground on which Hall V.-C.'s decision was upheld by the Court of Appeal. Jessel M.R. says (1): "Pending the litigation, but before the final judgment, the legatees assigned their share to mortgagees. It appears to me that the mortgagees took subject to the suit, and the result being that the plaintiffs' claim was bad, and that the plaintiffs were liable to pay the defendant's costs, that liability is paramount to the right of the incumbrancers." With this may be compared the ground for Swinfen Eady J.'s analogous decision in *In re Rhodesia Goldfields* (2), where the transfer was taken "during the progress of the action." See also *Bolton* v. *Curre*. (3)

In my opinion, therefore, Mr. Terrell's contention, broadly stated as it was, is supported neither on principle nor by authority, and, if there were no more in the case, the interest of these mortgagees under their assignments, made and notified as they were before action commenced, would have been as free from any liability for costs personally payable now by their assignor as that of any other individual beneficiary under the will.

But the case against them goes further. As a result of the order of February 22, 1915, they were both made defendants to the action. They appeared before me on June 14, 1915, and they have since attended in Chambers, and at no time has either of them objected either to the order for an account or to the proceedings thereunder. Now, their silence on that point is crucial, because, in my opinion, they could have stopped any order for an account being made had they chosen to do so. After assignment notified, they alone in respect of the interest assigned were entitled to demand an account. The legal right to the fund was in them; the joinder of their assignor as co-plaintiff would have been harmless, but it was

(1) 18 Ch. D. 309. (2) [1910] 1 Ch. 239, 244.
(3) [1895] 1 Ch. 544, 548.

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unnecessary; their presence as plaintiffs was, however, I think, essential, if it was required. The only circumstances, as it appears to me, under which an assignor in the position of Mrs. Gustavson here could, notwithstanding objection, maintain her right to an account as plaintiff with her notified mortgagee by assignment as defendant, would be if by her writ or summons she claimed redemption against her mortgagee. This she did not do.

Even before the Judicature Act the assignee was, I think, necessarily a party in equity. I would refer to this passage from the judgment of Chitty L.J. in *Durham Brothers* v. *Robertson* already cited (1): "In his suit in equity the assignee of a debt, even where the assignment was absolute on the face of it, had to make his assignor, the original mortgagor, party in order primarily to bind him and prevent his suing at law, and also to allow him to dispute the assignment if he thought fit. This was à fortiori the case where the assignment was by way of security, or by way of charge only, because the assignor had a right to redeem. Further, the assignee could not give a valid discharge for the debt to the original debtor unless expressly empowered so to do. The original debtor, whether he admitted the debt or not, was not concerned with the state of the accounts between the assignor and the assignee where the debt was assigned by way of security; and the rule was that where he did not dispute the debt he should have his costs of suit out of the debt; he was regarded in the light of a stakeholder. It is unnecessary to cite authorities in support of any of the above propositions." In other words, the equitable assignee was always dominus litis, unless, where the assignment was by way of mortgage, the assignor claimed redemption.

When, therefore, I consider the rights of these defendants in relation to this demand for an account and their attitude throughout both before me and in Chambers, I feel constrained to come to the conclusion that they were content to allow an account to proceed which they might have stopped, knowing that, as mortgagees, they would derive such benefit from the

(1) [1898] 1 Q. B. 765, 769.

proceedings as the improvement of their security in the event of the plaintiffs' success would bring them. The effect, I think, was, as in *In re Knapman* (1), to make their security subject to the suit. I do not forget that the trustees might also have objected to the order for an account at the instance of Mrs. Gustavson unless her assignees joined her as co-plaintiffs. Their silence does not, however, I think, disentitle them to the benefit of the assignees' acquiescence in their assignor's demand. In my opinion, therefore, whatever sum is charged upon Mrs. Gustavson's share in respect of costs incurred by her subsequent to the order of June 14, 1915, is chargeable in priority to the defendants' incumbrances thereon. But that result is reached only for the reason just given and for no other.

Solicitors: *Tippetts; T. England Preston; Pearce-Jones and Co.; J. H. Milton.*

A. L.

(1) 18 Ch. D. 300.

C. A.
1918
October 28.

In re J. WIGFULL & SONS' TRADE MARKS.

[1915 J. 1667.]
[1915 J. 1668.]

Trade Mark—Practice—Appeal—Order removing Mark from Register—Expiration of Time Limited for Appeal—Subsequent Decision of Court of Appeal in Another Case—Dissent from Judgment in First Case—Application to Enlarge Time for Appeal—Delay—Special Leave—"Unless the Court of Appeal shall enlarge the time"—Rules of Supreme Court, 1883, *Order* LVIII., *r.* 15.

In December, 1915, an order was made by Neville J. rectifying the Register of Trade Marks by removing the respondents' trade mark therefrom. No appeal from that order was entered by the respondents within the time limited for appeal. In May, 1918, the Court of Appeal in another case dissented from the view taken by Neville J. of the construction of the Trade Marks Act, 1905, in the respondents' case and overruled his decision. On an application by the respondents, under Order LVIII., r. 15, for an order enlarging the time for appealing from the order of Neville J.,

Held, that the Court had power to enlarge the time for appealing, if it were just that, under all the circumstances, an order enlarging the time should be made, but that the present applicants had shown no sufficient ground for making the order, and that their application must therefore be refused.

Held, also, that the fact that in a subsequent case the Court of Appeal had taken a different view of the construction of an Act of Parliament from that taken by the judge in a previous case was not necessarily a ground for enlarging the time for appealing from his decision.

Per Swinfen Eady M.R. For the purposes of an application under Order LVIII., r. 15, there is no distinction in meaning between granting special leave to appeal under the rule as it originally stood and enlarging the time for appeal under the rule in its present form.

Rule laid down by Brett M.R. in *In re Manchester Economic Building Society*, (1883) 24 Ch. D. 488, 497, followed.

MOTION for leave to appeal from an order of Neville J. made in an action of *J. Wigfull & Sons, Ltd.* v. *J. Jackson & Son, Ltd.* (1) notwithstanding the time limit had expired.

In 1915 the plaintiffs were the registered owners of two trade marks, both of which had been on the register for more than seven years. One was a compound mark, consisting of an oval scroll, the upper half of which was occupied by the device of a wheatsheaf with the letters "J. W." in the

(1) [1916] 1 Ch. 213.

lower half of the oval. This mark was registered on September 22, 1884, as an old mark used (as the fact was) for thirty years before 1875. The other mark was a wheatsheaf pure and simple, and was registered on June 30, 1902. Both marks were registered in class 42 for cereals, flour, and similar goods. The plaintiffs were millers and corn merchants, and carried on their business exclusively in the district of Sheffield, and they and their predecessors in title had for very many years used both marks continuously and exclusively on their sacks for the purposes of their said business.

The defendants were also millers and corn merchants at Bolton, in Lancashire, and they and their predecessors in business had since 1880 used the mark of a wheatsheaf to denote their goods. In the spring of 1915 the goods of the defendants began to compete with those of the plaintiffs in the district of Sheffield, and after some correspondence the plaintiffs commenced their action, alleging that the defendants were infringing their trade mark, and claiming an injunction and other usual relief. The defendants denied infringement, and alleged, and proved at the trial, that the mark of a wheatsheaf was common to the trade at the respective dates of the registration of the plaintiffs' trade marks, and was still common to the trade. There was also a separate motion by the defendants in respect of each of the plaintiffs' trade marks to expunge it from the register of trade marks, on the ground that it was common to the trade.

The action and motions were heard together before Neville J. On December 10, 1915, his Lordship gave judgment, in which he said that ss. 11 and 41 of the Trade Marks Act, 1905, must be considered together, and that s. 41 was no protection to a mark which had been on the register for seven years, if it in other respects offended against the provisions of s. 11. The plaintiffs' marks offended against s. 11, because at the dates they were respectively registered a wheatsheaf was common to the trade. The action must be dismissed with costs, and the motions to remove the 1902 mark succeeded with costs. With regard to the 1884 mark it was a compound mark, and might have stood but for the claim that the

C. A. 1918 J. WIGFULL & SONS' TRADE MARKS, *In re.*

defendants had infringed that part of it which consisted of a wheatsheaf. Therefore the plaintiffs must place a note on the register that they did not claim the exclusive use of the wheatsheaf, and pay the costs of the motion.

No appeal from that decision was entered by the plaintiffs (the respondents to the motions) within the time limited for appeal.

On May 30, 1918, the Court of Appeal in *In re Imperial Tobacco Co.'s Trade Marks* (1), in which a similar point arose, dissented from the view taken by Neville J. of the construction of the Act in *J. Wigfull & Sons, Ltd.* v. *J. Jackson & Son, Ltd.* (2) and overruled that decision.

The plaintiffs now moved, under Order LVIII., r. 15, for an order enlarging the time for appealing from the order of Neville J. on the motions to expunge.

Kerly K.C. and *H. B. Vaisey* for the motion. It is submitted in this case that the time for appealing should be enlarged. It is true that at the trial a large use of a wheatsheaf by millers in other parts of the country was proved, but not in the Sheffield area. The applicants relied on s. 41 of the Trade Marks Act, 1905. Since the decision in their case *In re Imperial Tobacco Co.'s Trade Marks* (1) has been decided by the Court of Appeal, in which a similar point arose. No doubt the facts in that case are open to distinction, but the Court of Appeal there put a construction on s. 41 combined with s. 11 different from that put upon them by Neville J. It follows, therefore, that if that construction is correct the decision of Neville J. was wrong. The present application is not made in the action for infringement, but in the matter of the applicants' trade marks. The decision of the Court below was that the applicants' trade marks were not trade marks at all—not that the present respondents were entitled to them. It is submitted that if the circumstances of the case are such that justice requires that the time for appealing should be extended, the Court will extend the time: *In re Manchester Economic Building Society.* (3) The question,

(1) [1918] 2 Ch. 207. (2) [1916] 1 Ch. 213.
(3) 24 Ch. D. 488, 497.

therefore, in this case is whether it is just that the time should be extended. The Court has a complete discretion in the matter. Here the position is that the applicants had a valuable right of property in their trade marks which formed a substantial part of the goodwill of their business, of which they have been deprived by the decision of Neville J. The policy of the Act is that, where one person has a trade mark, others should not be entitled to use it as an indication of origin, because such user is calculated to deceive. There would be no limitation on any rights of the public, and the respondents would not be damnified. The words of Order LVIII., r. 15, are very wide, and are the result of an alteration made in 1909. The cases cited in the note to the rule in the Annual Practice, 1918, p. 1111, are all of an earlier date than 1909. The words of the rule before it was altered were "without the special leave of the Court of Appeal," and the alteration was made because the construction put upon those words in *Baker* v. *Faber* (1) were thought to limit unduly the discretion of the Court. As the result of the order of Neville J., the property of the applicants has been destroyed; it has not been given to another. It would be a great hardship on the applicants that they should lose a valuable property because the judge has made a mistake of law. *Craig* v. *Phillips* (2) is cited in the text-books as an authority for the proposition that the fact in a subsequent case governed by the same principles the Court of Appeal arrived at a contrary decision is not a sufficient reason for extending the time for appeal. But it is submitted that that case does not support that proposition, and that the inference to be drawn from it is that the fact that a different view of the law has been taken by the Court of Appeal may be a sufficient ground of granting the leave. The Court will more readily intervene in a case where a fund has not been distributed or given to another person as the result of a decision.

[SWINFEN EADY M.R. referred to *Esdaile* v. *Payne*. (3)] In that case some of the land in question had changed hands

(1) [1908] W. N. 9. (2) (1877) 7 Ch. D. 249.
(3) (1888) 40 Ch. D. 520.

C. A. 1918 J. WIGFULL & SONS' TRADE MARKS, *In re.*

since the decision in the Court below. Where a right has accrued to a particular person the Court will not interfere with him in his enjoyment of it.

Colefax K.C. and *J. Hunter Gray K.C.* for the respondents, and *Austen-Cartmell* for the Comptroller-General were not called upon.

SWINFEN EADY M.R. This is an application by *J. Wigfull & Sons, Ltd.* to enlarge the time for appealing from an order made by Neville J. on December 10, 1915. In the year 1915 an action was brought by *J. Wigfull & Sons, Ltd.* against *J. Jackson & Son, Ltd.* in respect of infringement of trade mark, and that action failed; but there were two separate motions made under the Trade Marks Act, 1905, by *J. Jackson & Son, Ltd.* to take the trade mark of *J. Wigfull & Sons, Ltd.* off the register. The trade mark, the subject of one of the applications, was a device of a wheatsheaf; and on December 10, 1915, an order was made that the register be rectified by the removal of that mark from the register. That order was drawn up, passed and entered, in the year 1915; and there was no appeal from it, and the present application is to enlarge the time so that an appeal may now be brought. The reason for the present application is that in a case recently before this Court, of *In re Imperial Tobacco Co.'s Trade Marks* (1), a different view was taken by this Court of the true construction of the Trade Marks Act, and it is urged that, if the view then taken by this Court is correct and well founded, the decision of Neville J. was erroneous, and therefore the time ought now to be enlarged so that an appeal may be brought from his order.

In the case before Neville J. of *Wigfull's Trade Mark* (2), it appeared from the evidence adduced on the motions that a wheatsheaf was a device common to the trade in question and in general use throughout the trade; and, in fact, throughout the United Kingdom, except in the Sheffield district, in which Messrs. Wigfull carried on their business. The learned

(1) [1918] 2 Ch. 207. (2) [1916] 1 Ch. 213.

judge said (1): "But the use of the plaintiffs"—that was Messrs. Wigfull—" has been purely local,"—that is to say, in and around the district of Sheffield—" and in their local business they have not come across any of the numerous instances of the use of the wheatsheaf in the trade which have been proved before me. That there were a multitude of such cases the evidence proves beyond controversy, but curiously enough, although Sheffield is not a remote corner of the earth, it does not seem to have been within the ambit of the use of this particular device in the corn trade, and consequently it is not altogether unnatural that when the plaintiffs found their district invaded by a mark similar to their own, having had the mark of a wheatsheaf registered for a number of years, they thought that they were entitled to prevent the user of it by any other person. It has not been seriously argued, and of course it could not be, that there is such a thing as a district mark. A registered trade mark is a mark for the whole country, and cannot remain on the register merely because in a particular part of the country nobody else has been using the mark. What I have said disposes of the action. I hold that the wheatsheaf was a device common to the trade at the time of the registration of the two marks in 1884 and 1902, and that it is still common to the trade. Under those circumstances I think s. 41 does not protect it although both marks have been on the register for over seven years." Therefore he dealt with it upon the facts that it was a mark common to the trade, and he considered that s. 41 did not protect it, and therefore that it ought to be taken off the register.

The judge was dealing there with a mark common to the trade; and, except in a particular district in England, in universal use in the trade. There was evidence that bags and sacks marked with the wheatsheaf were supplied to millers and others all over the United Kingdom. So that the first ground which Mr. Kerly urged in support of his application to extend the time, that is to say, the nature of the case seems to me to be very much against

(1) [1916] 1 Ch. 218.

C. A. 1918

J. WIGFULL & SONS' TRADE MARKS, *In re.*

Swinfen Eady M.R.

the application. He put it in this way: that the result of the order from which the present applicants wish to appeal was not that his opponents, Jackson & Son, got the mark, but that it was lost without anybody except the public getting the benefit of it—that they lost it, and the mark was then the subject of universal use, and could be properly used by anybody. The fact that there must have been a very large number of persons using the mark for a long time, treating it as a mark in general use in the trade, is a reason why we should not lightly extend the time for appealing from this order. Is there any other ground proved? I have heard none. It was urged that in any question now of enlarging the time, regard must be had to the altered language of the Order LVIII., r. 15. Under the rule before it was altered the language was that no appeal should be brought except by special leave of the Court of Appeal, and it was urged that the grounds for special leave must have been greater and more weighty than the grounds for enlarging the time. In my judgment, where an application is made to enlarge the time for appeal, there must be some proper grounds for supporting it. It is not enough to say the time has expired; it expired more than two years ago, and therefore I cannot appeal without the time being enlarged; because it has expired, therefore I ask that it may be enlarged. That alone is no ground. In my judgment also, it is not necessarily a ground for enlarging the time that in some subsequent case a different view is taken of the construction of an Act of Parliament. The parties in the previous litigation had their advisers at hand; the judgment was pronounced in the Court of first instance; they had an opportunity of considering whether they should or should not appeal; and after considering, they determined not to appeal; and if years are allowed to go by without any appeal being presented, I am of opinion that a strong case on the facts should be made out before leave should be granted; that is to say, before the time should be enlarged. In *In re Manchester Economic Building Society* (1) the language used

(1) 24 Ch. D. 488.

by Brett M.R. in stating what the rule should be is almost in identical terms with what Mr. Kerly contended the practice should be under the rule as it now stands. His contention was this: that there is a judicial discretion in the Court to enlarge the time, and that the question to which the Court ought to address itself is this, and this only: Is it just to extend the time for appeal? Brett M.R., in *In re Manchester Economic Building Society* (1), put it in this way. He said: "I know of no rule other than this, that the Court has power to give the special leave, and exercising its judicial discretion is bound to give the special leave, if justice requires that that leave should be given." For this purpose I see no distinction between granting special leave to appeal and enlarging the time for appealing. That rule is equally applicable to both. In my opinion the Court has power to enlarge the time for appealing if it is just that, under the circumstances, an order enlarging the time should be made.

In the present instance, having regard to the fact that the mark was common to the trade except in the Sheffield district so long ago as 1915, and that for another period, nearly three years, the user has doubtless continued, and to the fact that the only ground put forward is that in a different case this Court has taken a different view of the true construction of the Trade Marks Act, in my judgment the applicants have not made out any sufficient ground for now enlarging the time in order that they may bring the order of Neville J. to this Court. For these reasons I think the application fails.

DUKE L.J. I agree. I think there can be no question now as to what is the nature of the discretion reposed in the Court, and what are the principles upon which it ought to be exercised; but in my judgment justice does not require in this case that the time should be extended. I have regard in particular to the nature of the controversy which existed between the present applicants and the whole of the milling trade and the acquiescence of the present applicants for a

(1) 24 Ch. D. 497.

C. A. 1918

J. WIGFULL & SONS' TRADE MARKS, *In re.*

long period of time in a decision of the question which affected not only them but the whole of their competitors.

EVE J. I am of the same opinion. I think that Mr. Kerly could start by saying that in the opinion of this Court, as expressed in *In re Imperial Tobacco Co.'s Trade Marks* (1), the decision below in this case was wrong. The Court said so in express terms in the judgment in *In re Imperial Tobacco Co.'s Trade Marks.* (1) Then it comes to this: that there is in this Court a decision from which one is able to conclude that the decision in the particular case under review was wrong. Is that in itself a sufficient ground to ask for the extension of the time for appealing? The answer to that is, I think, in the negative. Mr. Kerly says that in this particular case it is sufficient ground because the judgment in the Court below did not vest any particular right of property in his opponents; but I think that loses sight of the fact that the judgment in the Court below threw open the right to the use of that for which he claims a monopoly not only to his opponents, but to the community at large. I cannot think the fact that the number of persons who obtained the benefit of that judgment is larger than in an ordinary case between two litigants affords any ground for saying that a state of circumstances exists which should induce us to depart from what seems to be the well-settled rule, that the mere fact that a subsequent opinion of this Court shows that a judgment of an inferior Court was wrong gives no ground for enlarging the time.

I think, therefore, that the application should be dismissed.

Application dismissed.

Solicitors for applicants: *Peacock & Goddard, for H. & A. Maxfield, Sheffield.*

Solicitors for respondents: *Chester, Broome & Griffithes, for Fielding & Fernihough, Bolton.*

Solicitor for Comptroller-General: *Solicitor to the Board of Trade.*

W. I. C.

(1) [1918] 2 Ch. 207.

YOUNGER J.

1918

October 31.
November 7, 14.

In re JAMES' MORTGAGE TRUSTS.

[1918. J. 77.]

Lunatic—Mortgagee—Payment off—Vesting Order—Lunacy Act, 1911 (1 & 2 *Geo.* 5, *c.* 40), *s.* 1.

The effect of the Lunacy Act, 1911, s. 1, is that the jurisdiction of the Judge in Lunacy (conferred by the Lunacy Act, 1890, s.135, sub-s.1) (1), to make a vesting order where a lunatic is seised of land by way of mortgage, is transferred to the High Court in cases where the lunatic is a trustee for others; but, where the lunatic is himself entitled to the mortgage debt, the jurisdiction remains with the Judge in Lunacy. Where a lunatic mortgagee has become merely a trustee of the mortgaged premises for the mortgagor by the mortgage money being paid off, the High Court has no jurisdiction to make an order.

PETITION.

In 1912 Margaret Jones advanced to the petitioner 200*l.* on mortgage of freehold premises. In March, 1915, she was admitted as a lunatic to an asylum, where she still was. In October, 1916, repayment of the mortgage money, with interest, was made by the petitioner to the solicitors then acting in the affairs of the lunatic. By an order of June 6, 1918, a receiver of the lunatic's estate was appointed under s. 116 of the Lunacy Act, 1890. Part of the money repaid was applied in maintenance of the lunatic, and the balance was, pursuant to the order of June 6, 1918, paid into court. The Master in Lunacy considered that, having regard to the Lunacy Act, 1911, s. 1, he had no power to make an order

(1) Lunacy Act, 1890, s. 135: "(1.) When a lunatic is solely or jointly seised or possessed of any land upon trust or by way of mortgage the Judge in Lunacy may by order vest such land in such person or persons for such estate, and in such manner, as he directs."

Lunacy Act, 1911, s. 1: "The powers of the Judge in Lunacy under sections one hundred and thirty-five to one hundred and forty-three of the Lunacy Act, 1890, as amended by any subsequent enactment, to make such vesting and other orders as are in those sections mentioned shall except so far as they relate to lunatic mortgagees, not being also trustees, be transferred to, and, subject to rules of the Supreme Court, be exerciseable by, the High Court, and, except as aforesaid, those sections as so amended shall have effect accordingly as if for references to the Judge in Lunacy there were substituted references to the High Court."

YOUNGER J. 1918 JAMES' MORTGAGE TRUSTS, *In re.*

vesting the legal estate in the mortgaged premises, which remained in the lunatic, in the petitioner, who accordingly now applied to the Court.

Percy Wheeler for petitioner. The mortgagee was not originally a trustee, but has become a trustee by reason of the mortgage debt having been paid off—a bare trustee holding the legal estate in the mortgaged premises for the mortgagor—and, therefore, s. 1 of the Lunacy Act, 1911, applies; and this Court has jurisdiction to make the order.

Kenneth Wood for the receiver, not opposing, referred to s. 341 of the Lunacy Act, 1890, defining "trust" and "trustee"; *In re Pagani* (1); *London & County Banking Co.* v. *Goddard* (2); *In re M.* (3)

YOUNGER J., after stating the facts. The case is one in which the order should be made if at all possible. But the question is whether this Court has any jurisdiction to make it. The answer depends upon the true effect of s. 135 of the Lunacy Act, 1890, and s. 1 of the Lunacy Act, 1911.

The jurisdiction conferred by the Act of 1890 upon the Judge in Lunacy was exclusive. It ousted any on the part of the High Court: *In re M.* (3) This position was, however, modified by the Act of 1911. The effect of s. 1 of that Act, broadly stated for present purposes, I think, is that the jurisdiction of the Judge in Lunacy under the earlier Act is transferred to the High Court in all cases where the lunatic mortgagee is a trustee for others; but, where the lunatic, being a mortgagee, is or was himself entitled to the mortgage debt, the jurisdiction remains with the Judge in Lunacy as before.

This statement of the effect of the section is, it will be seen, based upon the view that the words "not being also trustees" mean not being also trustees of the mortgage debt. That construction has the advantage of attributing to the section an obvious and natural purpose, namely, to transfer the power to make vesting orders, in those cases in which the lunatic trustee or mortgagee is merely a link in the administration

(1) [1892] 1 Ch. 236. (2) [1897] 1 Ch. 642, 649.
(3) [1899] 1 Ch. 79.

of some trust, to that Court which is normally charged with the execution or administration of a trust, but to leave in the hands of the Judge in Lunacy the sole jurisdiction to make such orders in those cases in which the mortgage money belongs to the lunatic himself.

Manifestly, the Judge in Lunacy has special knowledge of all the circumstances relating to the lunatic's property; he is pre-eminently in a position to ascertain and satisfy himself whether, for instance, a mortgage debt has been properly discharged, either by payment to the lunatic, or, as in the present case, by its being in part applied for her benefit. The duty of vesting the legal estate in the owner of the equity, after all claims of the lunatic under the mortgage have been paid or satisfied, is most peculiarly a matter for him. And that is the jurisdiction which, under the section, is reserved to him. That it exists up to the moment of the debt being paid off is clear; that it must exist immediately afterwards would seem to be necessary, but even less necessary than that it should continue after an interval, for thereby is, or may be, created that very difficulty of proving payment or satisfaction which the Judge in Lunacy is so peculiarly fitted to deal with. And, if the above be, as I think it is, the true result of the section, it would follow that this Court has no power to make a vesting order in a case like the present, where the lunatic is not, and never has been, a trustee in relation to the debt.

It is said, however, that this is not an accurate, or at all events not a complete, statement of the effect of the Act. The lunatic here, the mortgage having been paid off, is, it is said, in a real sense a trustee of the land for the petitioner. She is, therefore, so it is said, "a trustee," and the case is one in which the jurisdiction is in terms transferred to this Court by the Act of 1911. But there are, in my judgment, more answers than one to this view. First of all, although the lunatic may be in some sense a trustee, is she "also" a trustee? The words "lunatic mortgagees, not being also trustees," however doubtful in other respects may be their effect, seem clearly to relate only to a case where at

YOUNGER J. 1918 JAMES' MORTGAGE TRUSTS, *In re.*

one and the same moment the lunatic is, or has been, both a mortgagee and a trustee. Now, in the present case, although it is true that the lunatic here is now, in the sense above stated, a trustee for the petitioner, she has ceased, the mortgage having been paid off, to be a mortgagee. See *London and County Banking Co.* v. *Goddard*. (1) Further, until she had ceased to be a mortgagee, she did not become a trustee. Therefore, she is not, and never has been, in relation to this mortgage at one and the same time—nor in any sense—both a mortgagee and a trustee; and on that ground alone the jurisdiction on this petition would appear to remain where it was placed by the Act of 1890—that is to say, in the Judge in Lunacy. Nor is this answer so narrow or pedantic as at first sight it may seem to be. In truth, it goes to the root of the whole matter. Approaching the consideration of the Act of 1911 from another angle, it confirms the view already expressed as to its true effect. A trusteeship of the legal estate and the position of mortgagee never normally co-exist under a mortgage in ordinary form. No more convincing reason need, therefore, be sought for in favour of the view that the trusteeship of the legal estate is not the kind of trusteeship pointed at in the section at all.

But there are others. Under the definition section, s. 341, of the Act of 1890, with which the Act of 1911 is to be read, the expressions "trust" and "trustee" do not include the duties incident to an estate conveyed by way of mortgage. It appears to me that the execution of a reconveyance of the hereditaments after mortgage debt satisfied is just one of these duties. I am not unaware that North J., in the case already cited, has expressed the opinion, with reference to the corresponding definition in the Trustee Act, 1893, "that it related exclusively to an estate conveyed by way of mortgage while that mortgage security continues to exist as such." But the observation was made in a case where the present point did not arise—for the trustee there was the mortgagor and not the mortgagee—and it may,

(1) [1897] 1 Ch. 642, 650.

I think, well be doubted whether, at least as applied to the Acts now under review, the definition can properly be limited to the period stated. For if, notwithstanding that definition, the trusteeship indicated in the Act of 1911 can be held to extend to the trust of the legal estate after debt satisfied, the reservation to the Judge in Lunacy of the jurisdiction to make vesting orders in relation to lunatic mortgagees, the importance and suitability of which reservation I have already insisted upon, becomes little more than illusory. In the case of every mortgage paid off, the mortgagee for some moment of time becomes a trustee in the sense indicated; indeed, at the moment preceding the vesting order, he is such a trustee. If, therefore, the trusteeship referred to in the Act extends to such a trust, it must follow that the jurisdiction reserved to the Judge in Lunacy would be taken away by the very fact which gave occasion for its exercise.

In my opinion, therefore, and on all the above grounds, there is no jurisdiction in this Court to make the order asked for.

I have dealt with this case at length, and I express the conclusion at which I have arrived with diffidence, because that conclusion is at variance with the opinion of the learned Master in Lunacy, Master Theobald. I recall, however, the observations of Stirling J. in *In re M.* (1) as to the great importance which attaches to vesting orders and as to the undesirability of their being made by Courts whose jurisdiction is open to doubt; nor do I forget his view that the safer course may be to abstain from making one in such a case. It may be the learned Master, after considering my reasons, may be willing to accept my opinion. If not, this decision can be brought before a higher Court, and this important question will thus be set at rest. (2)

Solicitors: *T. D. Jones, for George, Son & Davies, Cardigan.*

(1) [1899] 1 Ch. 79, 85. (2) The Master accepted the decision.

A. L.

Applied. *Re* BARNATO (*decd.*). [1949] 1 All E.R. 515.

C. A. 1918 October 17.

Followed. *Re* BARNATO. [1949] 1 Ch. 21

Applied. *Re* BARNATO. [1949] 1 Ch. 258

In re CLAY.

CLAY v. BOOTH.

In re A DEED OF INDEMNITY.

[1916 C. 53.]

[MANCHESTER DISTRICT REGISTRY.]

Practice—Executor—Acceptance of Office—Deed of Indemnity by Beneficiaries—Administration Action—Orders against Executor with Costs—No Claim by Executor for Repayment—Right of Beneficiaries to Declaratory Order as to Rights under Deed—Rules of Supreme Court, 1883, *Order* XXV., *r.* 5; *Order* LIVA, *r.* 1.

By Order XXV., r. 5: "No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed, or not."

By Order LIVA, r. 1: "In any Division of the High Court, any person claiming to be interested under a deed, will, or other written instrument, may apply by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested."

Testator by his will appointed his wife and B. executors and trustees thereof. The wife predeceased the testator. B. was desirous of renouncing probate, but upon being pressed by the beneficiaries he consented to prove the will upon their executing a deed of indemnity. Proceedings were subsequently taken by two of the beneficiaries to administer the estate. In these proceedings two orders were made against B., and he was ordered to pay the costs. In the letter enclosing a cheque for the costs under the first order he stated that he reserved his rights under the deed of indemnity. The beneficiaries then presented a petition in the Palatine Court under Order LIVA of the Rules of the Supreme Court, 1883, which is adopted and acted upon as a rule of the Palatine Court, and Order XXIV., r. 5, of the Palatine Rules, which corresponds with Order XXV., r. 5, of the Rules of the Supreme Court, for the construction of the deed of indemnity and for a declaration that B. was not entitled to repayment of the costs ordered to be paid by him. The Vice-Chancellor held that he had jurisdiction under the orders to decide the question, and made the declaratory order asked. On appeal:—

Held, that as B. had never made a claim that he was entitled to recover or be repaid either of the two sets of costs, but had merely stated that he reserved his rights under the deed, whatever they might be, the Vice-Chancellor had no jurisdiction to make the declaratory order against him, and that the order must therefore be discharged.

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Docks Joint Committee [1892] 3 Ch. 242; *Société Maritime et Commerciale* v. *Venus Steam Shipping Co.* (1904) 9 Com. Cas. 289; and *Guaranty Trust Co. of New York* v. *Hannay & Co.* [1915] 2 K. B. 536 distinguished. Dictum of Cozens-Hardy M.R. in *Dyson* v. *Attorney-General* [1911] 1 K. B. 410, 417 applied.

APPEAL from a decision of the Vice-Chancellor of the County Palatine of Lancaster.

Robert Clay, by his will dated December 4, 1889, as altered by a codicil thereto dated September 28, 1894, appointed his wife (who predeceased him) and James Edward Booth trustees and executors thereof, and devised and bequeathed to them all his residuary real and personal estate, which included his business of a dyer and bleacher, upon trust, to sell and convert and divide the proceeds of sale in equal shares amongst his three sons, Thomas Reginald Clay, Sidney Robert Clay and George Vernon Clay, and his daughter, Marie German, the wife of Bernard Foster German, and he directed that the share of his daughter should be settled.

The testator died on November 9, 1914.

The estate of the testator being complicated, and there being no power in the will to the executors to carry on the business, Booth hesitated to undertake the executorship and trusteeship; but on being pressed by the beneficiaries, he consented to do so upon their executing a deed of indemnity in his favour. Accordingly, on March 5, 1915, a deed of indemnity was entered into between the four beneficiaries under the will, Bernard Foster German and Booth, whereby the beneficiaries and B. F. German jointly and severally covenanted with Booth to indemnify him against all claims and demands in respect of certain specified matters, "or any acts, proceedings done or taken, or to be done or taken, by him arising from, or in consequence of, his having accepted the executorship and trusteeship of the said will," and particularly on account of his having continued to carry on the business of the testator, and on account of his having entered into a certain mortgage; and the beneficiaries thereby charged in favour of Booth all their shares, estates, and interests under the testator's will and codicil, and covenanted

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with him that their shares might be impounded if any action should be brought against him for any act or proceeding as aforesaid which might be deemed a breach of trust, or in respect of which a claim or demand might be made against him.

On the same date a conditional agreement was entered into between the same parties, other than B. F. German, for the purchase of the testator's business from Booth by a limited company to be formed by two of the beneficiaries, S. R. Clay and G. V. Clay, upon the terms therein set out.

On May 5, 1915, Booth duly proved the testator's will.

On March 27, 1916, S. R. Clay and G. V. Clay presented an originating petition entitled "In the Matter of the Estate of Robert Clay, deceased, Clay *v.* Booth," to which Booth, T. R. Clay and Marie German were made respondents, asking (1.) that the conditional agreement of March 5, 1915, might be sanctioned, and the executor ordered to carry it out; (2.) administration of the testator's estate; and (3.) a receiver and manager.

On April 11, 1916, an order was made upon the petition for administration of the estate.

On June 10, 1916, the registrar made his report, by which he certified that the conditional agreement was for the benefit of the possible issue of the defendant Marie German.

On July 12, 1916, a supplemental petition was presented by the petitioners, asking for a day to be fixed for the completion of the conditional agreement, and for further directions to be given; and on July 21, 1916, an order was made on the petition fixing a date for the completion. On January 18, 1917, the action came on on second further consideration.

In the course of the administration proceedings Booth was required to answer certain inquiries. He purported to do so by an affidavit to which he exhibited certain accounts.

On May 1, 1917, the petitioners moved to remove this affidavit and exhibit from the file, and on May 10 an order was made that the affidavit and exhibit should be taken off the file as scandalous and irrelevant, and as an abuse of

the process of the Court, and Booth was ordered to pay the costs of the motion.

The petitioners' bill of costs of the motion was taxed at 166*l.* 6*s.*, and on October 26, 1917, Booth's solicitor sent to the petitioners' solicitors a cheque for the amount, with a covering letter which contained the following passage: "In making this payment the executor reserves all rights he may have under the deed of indemnity of the 5th March, 1915."

On October 20, 1917, Booth took out a summons for remuneration in respect of his acting as executor of the testator's will; but on November 9, 1917, the summons was dismissed with costs against him.

On November 23, 1917, the petitioners' solicitors wrote to Booth's solicitor stating that it would be useless to prepare a bill of costs against the executor in respect of the dismissal of his summons for remuneration if the only result would be that he could at once recover under the deed of indemnity.

On November 30, 1917, Booth's solicitor replied that the matter of any claim which the executor might be advised to make against any of the parties to the deed of indemnity appeared to him to be one for him to raise at such time and in such manner as he might be advised; that his rights under the deed were a matter of contract between the parties thereto, and were not claims by him against any fund in court or against the estate, and that he regarded any claim to indemnity under the deed as quite outside the administration; that the executor's claims under the deed had not been formulated or ascertained, and probably could not be until the close of the action for administration, and that the items referred to were in any case only some of those which might then arise for determination or settlement if the executor thought fit to raise them, and that certainly the executor, as the person entitled to the benefit of the deed of indemnity, reserved all, or any, rights whether as to costs or other matters which he might have under the deed against all or any of the parties to it.

On November 22, 1917, the petitioners presented the present petition, which was entitled: "In the Matter of the Estate of

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Robert Clay, deceased, Clay *v.* Booth," and "In the Matter of the Deed of Indemnity of March 5, 1915," and by it the petitioners submitted that it was futile to proceed with the taxation of the bill of costs of the summons if the executor had the right which he asserted to recover the same when taxed and paid, and prayed that it might be declared that on the true construction of the deed of indemnity, and in the events which had happened, the executor had not the right to obtain repayment of the sum of 166*l.* 6*s.*, the costs of the motion paid by him, and that he would not have the right to obtain repayment of any costs of the summons when taxed.

The petition was heard before the Vice-Chancellor on February 1, 1918. The only question argued was as to the jurisdiction of the Court to make any order in the matter.

The question turned on the construction of Order LIVA, r. 1, of the Rules of the Supreme Court, 1883, which is adopted and acted upon as a rule of the Palatine Court, and Order XXIV., r. 5, of the Palatine Rules, which is in the same terms as Order XXV., r. 5, of the Rules of the Supreme Court, 1883. (1)

The Vice-Chancellor held that he had jurisdiction to deal with the matter under Order LIVA, r. 1, and directed that the petition should be amended by striking out the names of T. R. Clay and Marie German as respondents, and adding them as co-petitioners, and on the petition as so amended he declared that on the true construction of the deed and in the events which had happened the respondent Booth had no right to recover under the terms of that deed as against the petitioners, or any of them, the costs directed to be paid by him under the orders of May 10 and November 9, 1917.

Booth appealed.

(1) Order XXV., r. 5: "No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed, or not."

Order LIVA, r. 1: "In any Division of the High Court, any person claiming to be interested under a deed, will, or other written instrument, may apply by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the persons interested."

The appeal came into the paper on May 3, 1918, and then stood over till May 6, when it was mentioned as to terms of settlement. An arrangement as to terms having failed, the appeal was, in October, 1918, directed to be restored to the list, and the heading of the petition was then ordered to be amended by striking out the title of the suit and entitling it only in the matter of the deed of indemnity.

Jenkins K.C. and *Maberly* for the appellant. The Vice-Chancellor had no jurisdiction to make the order appealed from. Order LIVA, r. 1, merely enables the Court to do, on an originating summons, what it could have done in an action commenced by a writ. It deals only with questions of construction arising under a document. No question here arises on the construction of the document. The language of the deed of indemnity is clear and unambiguous. Taking Order LIVA, r. 1, and Order XXV., r. 5, together, it is submitted that they were not intended to apply to a case where a person simply seeks to obtain a declaration that he is not under a liability: *Guaranty Trust Co. of New York* v. *Hannay & Co.* (1), *Dyson* v. *Attorney-General.* (2)

[They also referred to *North-Eastern Marine Engineering Co.* v. *Leeds Forge Co.* (3)]

A. Grant K.C. and *C. E. R. Abbott* for the respondents.

[SWINFEN EADY M.R. The first thing to see is whether Booth has ever made a claim.]

In the court below the only question argued was as to jurisdiction. There is an affidavit in which Booth sets up a claim under the deed of indemnity.

[SWINFEN EADY M.R. We are considering whether the order of the Vice-Chancellor is right. If down to that time Booth had never made a claim would there be any jurisdiction to make the order?]

Yes. If A., a party to a contract with B., asserts that he has rights under the contract against B., which B. denies, B. may come to the Court for a declaration that A. has no such rights. When the petition was presented there was good

(1) [1915] 2 K. B. 536, 547.
(2) [1911] 1 K. B. 410, 417.
(3) [1906] 1 Ch. 324; [1906] 2 Ch. 498.

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reason for having the question determined whether, under the deed of indemnity, the appellant had the right claimed. Before the Vice-Chancellor the appellant in effect reserved his rights under the deed. In such a case a person interested under the deed is entitled to say that he has no such rights. Taking the words of the two rules together, it is submitted that there is jurisdiction where a party to a deed says he has a right under it for another party to the deed to bring an action for a declaration that he has no such right. Under Order XXV., r. 5, the Court may now make a declaration where no consequential relief can be claimed. Therefore a person may bring an action for a declaration of his rights, and that whether he could claim any consequential relief or not. Declaratory orders have been made in cases where the plaintiff had no right of action at the time the order was made. The words of Order LIVA, r. 1, are in the respondents' favour. It is suggested that the rule does not include the case of declarations negativing rights. But the Court would be putting a very narrow construction on the rule if it were to hold that it only applies to the case of the assertion of a claim and not to the reservation of a right.

[DUKE L.J. Suppose a man says: "I think I shall get evidence to support my claim." Can you bring him into court before the expiration of the six years?]

It may be that that is the logical conclusion. We crave in aid the judgment of Buckley L.J. in *Guaranty Trust Co. of New York* v. *Hannay & Co.* (1) The rules are not to be limited to a case where a person has asserted a right, but extend also to a case where he has reserved it. Order XXV., r. 5, goes to this: that a man may come to the Court for a declaration that he is not liable for a debt. This is supported by the observations of Pickford L.J. in *Guaranty Trust Co. of New York* v. *Hannay & Co.* (2)

[SWINFEN EADY M.R. In that case there was a claim made and prosecuted. Here there is no such claim.]

Pickford L.J.'s observations were not confined to the case where there was a lis—a cause of action—but extend to a

(1) [1915] 2 K. B. 536. (2) [1915] 2 K. B. 557, 562.

case where there is no cause of action. It is submitted in this case that a right was asserted.

[SWINFEN EADY M.R. That is a question of fact.]

If a man says that he reserves his rights under a deed you can go to the Court for a declaration what those rights are. Here the intention of the respondents was to make it not worth the while of the appellant to bring an action. *Société Maritime et Commerciale* v. *Venus Steam Shipping Co.* (1) was relied on by Pickford L.J. as supporting his view.

[SWINFEN EADY M.R. The defendants there formulated a specific claim, and tendered a ship for loading under the contract.]

There was then no action existing. In *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee* (2) the P. & O. Co. had never asked for unappropriated berths.

[SWINFEN EADY M.R. The company had there a right to ask for unappropriated berths.]

Jenkins K.C. was not called upon to reply.

SWINFEN EADY M.R. This is an appeal of the defendant J. E. Booth from an order of the Vice-Chancellor of the County Palatine of Lancaster, made on February 1, 1918. It was made upon a petition which was first entitled: "In the Matter of the Estate of Robert Clay, deceased, Clay *v.* Booth," which was an existing administration suit; and then it was also entitled as if it were an originating summons, or originating petition: "In the Matter of a Deed of Indemnity." When the appeal first came on for hearing before this Court in May last it was ordered that the petition should be amended by striking out the title in the suit. The petition must, therefore, be treated for the present purpose as if it was a proceeding in the matter of the deed. The order under appeal declares that upon the true construction of a deed of indemnity and in the events which have happened the defendant Booth has not the right to obtain repayment of certain costs. The costs in question were the costs of two

(1) 9 Com. Cas. 289. (2) [1892] 3 Ch. 242, 246.

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matters. In the administration proceedings an order was made that an affidavit, filed by the defendant Booth, with certain accounts exhibited thereto, should be taken off the file, and that he should pay the costs of the application. The costs have been taxed and paid. He also issued in the same proceedings a summons to obtain certain remuneration, and that was dismissed, and he was ordered to pay the costs of that application ; and it is the costs of those two matters which the order under appeal declares he is not entitled to obtain repayment of under the deed of indemnity. The facts leading up to the dispute between the parties may be stated very shortly indeed for the purposes of this appeal.

The defendant Booth was named as executor in the will of the testator Robert Clay jointly with the testator's wife. The wife predeceased the testator, and the defendant Booth hesitated about accepting probate, and was desirous of renouncing it. But upon pressure from all the beneficiaries, they being the four children who benefited under the will, and the husband of one of the children, and upon their executing upon March 5, 1915, a full deed of indemnity, he agreed to accept the office of executor, and proceeded to prove the will. Subsequently there were proceedings of a lengthy character, involving the partial administration of the estate in the Palatine Court. And it was in those administration proceedings that the two orders were made under which the defendant Booth, the executor and the party to be indemnified under the deed of indemnity, was ordered to pay certain costs.

The petitioners in the present petition allege that when the first of the costs ordered to be paid were paid by the defendant Booth (those were the costs with regard to taking the affidavit off the file) he sent a cheque for the amount, with a covering letter which contained this final passage : " In making this payment the executor reserves all rights he may have under the deed of indemnity of the 5th March, 1915." Now, in any case, those words seem to me to be unnecessary and mere surplusage. Under that order, which was not appealed from, he was under an obligation to pay

the costs, and it was not necessary, in order to preserve any rights he might have, that he should expressly reserve them when he came to make the payment. The petition does not allege that he had purported to reserve any rights in respect of the second set of costs, that is, of his application for remuneration, which was dismissed. Those costs at that time had not been paid; they had not, in fact, been taxed. But the applicants appear to have thought that it would be unnecessary to tax them; and with regard to that the petitioners in their petition, after alleging that his summons for remuneration was dismissed with costs, state: "Your petitioners humbly submit that it is futile and unnecessary to proceed with the taxation of the said costs if the defendant James Edward Booth has, as he asserts, a right, notwithstanding the said order, to recover the same if, and when, taxed and paid." It is only there that it is introduced, by way of parenthetical allegation, that the defendant Booth had asserted that he had the right to recover the amount under the deed.

Upon the facts, having regard to the affidavits on both sides, I am quite satisfied that the defendant Booth never did make the claim that he was entitled to recover or to be repaid the two sets of costs, or either of them, under, or by virtue of, the deed. All that he did was to reserve his rights, whatever they might be. Not only did he never formulate any claim to be repaid or ask for repayment, but he never in terms said that he had the right to be repaid. That was the position when the present originating petition was presented. When, later, he was served with the petition with a view of drawing him to see whether he made any, and what, claim, he considered his position, and wrote on November 30, 1917, that his claims, if any, had not been ascertained or formulated, and probably could not be so until after the close of the administration action. He made no claim then and formulated no claim; he intimated that he was not in a position to say whether he would or would not have a claim, and if he had, what that claim would be. He was going to wait until the end of the administration and see what costs were

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provided for in the course of the proceedings before he determined whether any claim would, in fact, arise under the deed.

That being the position the question arises: Had the Court any jurisdiction upon the petition to make an order that, under the deed, the defendant Booth had no right to obtain repayment?

The present proceedings were taken under Order LIVA, r. 1, of the Rules of the Supreme Court, which is adopted and acted upon in the Palatine Court, and Order XXIV., r. 5, of the Palatine Rules, which corresponds with Order XXV., r. 5, of the Rules of the Supreme Court. It is claimed under those rules that although no right of the petitioners has been interfered with, and although no claim has been made against them, and although in their view they have no claim against the defendant Booth, the petitioners are nevertheless entitled to come into court and ask for a declaration that the defendant Booth has no claim against them in respect of the matter in question. I pointed out the fact that he had not made any claim. But, under those circumstances, are they entitled to come and have it determined that he has no claim? In my opinion they are not. None of the authorities to which reference has been made justify such procedure.

In *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee* (1) Lindley L.J. pointed out that the position of the Peninsular and Oriental Co. was that it was entitled to have unappropriated berths unfettered by legal restrictions, and that it was entitled to exercise its option to have such berths, or to have appropriated berths on terms which might be agreed upon. He then passed away from the question of the appropriated berths, and the declaration made had reference to the unappropriated berths. That was a case in which regulations had been made which, if valid, would have excluded the right of the Peninsular and Oriental Co. to the unappropriated berths in respect of which the Court determined that they were entitled unfettered

(1) [1892] 3 Ch. 242, 258.

by the regulations, and made a declaration to that effect. So that it was a case where regulations had been purported to be made which would have excluded the company's enjoyment of a right which the Court held that they had.

The next case in order is *Société Maritime et Commerciale* v. *Venus Steam Shipping Co.* (1) in 1904. That was a case in which the plaintiffs claimed a declaration that they were not bound to load a certain steamship; but the defendants alleged that, by virtue of the agreement, the plaintiffs were under an obligation to load the steamship. They were asserting a right to have their ship loaded by the plaintiffs under an alleged contract; and thereupon the plaintiffs were held entitled to bring the action to have it declared they were not bound to load the ship as claimed by the defendants. But reliance was mainly placed upon what was said by Pickford L.J. in *Guaranty Trust Co. of New York* v. *Hannay & Co.* (2) Pickford L.J. there first came to the conclusion that there was no necessity in order to invoke proceedings under the rules that we are now considering that there should be an existing cause of action. Then he went on to consider whether the rule could be invoked only by the person claiming the right and intending to assert it. And, again, he negatived that. But no inference whatever can be drawn from that in favour of the petitioners here to the effect that the proceedings can be invoked not only where there is no cause of action and the person instituting the proceedings does not assert the right, but where there is no claim at all by anyone—by the plaintiff against the defendant, or vice versa. Here the position of the parties is that no claim is made by the defendant Booth as against the petitioners, and the petitioners by their petition make no claim against the defendant Booth. The observations that were made by Cozens-Hardy M.R. in *Dyson* v. *Attorney-General* (3) may properly be referred to. He there said: "But I desire to guard myself against the supposition that I hold that a person who expects to be made defendant, and who prefers to be plaintiff, can, as a matter

(1) 9 Com. Cas. 289.
(2) [1915] 2 K. B. 536.
(3) [1911] 1 K. B. 410, 417.

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of right, attain his object by commencing an action to obtain a declaration that his opponent has no good cause of action against him. The Court may well say: 'Wait until you are attacked and then raise your defence,' and may dismiss the action with costs." This is really the position in the present case. The petitioners have not been attacked. No claim has been made against them; but they launched these proceedings to have it determined that some one who has not made a claim and who has not asserted any right has no claim and has no right. In my opinion they are not entitled to do that. As has been pointed out by Duke L.J. during the course of the argument, with regard to rights under contracts there are certain statutory limitations which fix the time during which actions may be brought, and a party to a simple contract has the full statutory period to determine whether or not he will bring an action. And it is not open to a person, certainly to one against whom no claim in fact has been made, to cut the matter short by bringing an action at his own option, and saying, "I wish to have it determined that you have no claim whatever against me." That really is the nature of the proceedings in the present case.

I am, therefore, of opinion that the order under appeal was one that ought not to have been made, and that the Vice-Chancellor was in error in making it. I think the order cannot be supported, and should be discharged.

DUKE L.J. I am of the same opinion. I agree entirely with the conclusions of fact at which the Master of the Rolls has arrived; and it is upon those findings of fact that my judgment in this case proceeds. I regard this defendant as a defendant who has done nothing which warranted the petitioners making him a defendant in an action. I do not myself believe that, in the ordinary case of possible controversy between parties, it is open to one of the parties, because he apprehends a claim will be made against him, to serve a writ or other process upon the other party in order to obtain a decision that that claim could not be made. It seems to me to go far beyond anything which has existed in the past history

of litigation in this country, and to open up a vista—a great danger—of needless and costly controversy fomented by parties who delight in litigation. I am not referring to the parties in this case, although they have had to litigate a good deal. I am only referring to the grave prospect there is if any citizen who possibly supposes he may have litigation at some future time against him is to be entitled to safeguard himself and set his affairs right by making his supposititious antagonist the defendant to an action. That might tend to keep possible litigants in a very cautious frame of mind; but I do not think it is within the right of the subject to start legal proceedings in such a state of things. In the cases which have been referred to by the Master of the Rolls there is no trace of this right of spontaneous litigation. I do not myself find any trace of it as I read the judgments in *Guaranty Trust Co. of New York* v. *Hannay & Co.* (1) No doubt if you detach expressions in the course of elaborate judgments from their context you may arrive at some very startling results; but I cannot doubt that any of the Lords Justices who were parties to that decision would have been greatly surprised to hear some of the conclusions which are founded upon it here to-day.

I have come to the conclusion that this order was wrong, and ought to be reversed.

EVE J. I agree. So soon as it was demonstrated that no specific right had been asserted and no claim formulated, the Court had, in my opinion, no jurisdiction to deal with the petition in the way in which it has been dealt with. I think the appeal succeeds, and ought to be allowed.

Appeal allowed,

Solicitors: *Rawle, Johnstone & Co., for G. A. Booth, Manchester; Skelton & Younghouse, Manchester.*

W. I. C.

(1) [1915] 2 K. B. 536.

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October 25,
28, 29.

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In re GIBBS.

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[1917 L. 1353.]

Will—British Subject resident in France—Unattested French Holograph Will—Freehold Land in England—Trust for Sale—Share in Proceeds of Sale—Interest in Land—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 1—"*Personal estate*"—*Wills Act*, 1861 (24 *& 25 Vict. c.* 114), *s.* 1.

In 1904 a British subject resident in France made a holograph unattested French will leaving all she possessed and all to come to her at the death of her father to the defendant F. Letters of administration with that will annexed as regarded the personal estate of the testatrix were granted to F. in this country under the Wills Act, 1861 (Lord Kingsdown's Act), and an earlier English will made by the testatrix in 1895 was also admitted to probate. At the time of her death in 1907 the testatrix was entitled in reversion expectant on the death of her father to a share in his marriage settlement trust funds, part of which was at the time of both his and her death invested in freehold hereditaments purchased under a power in that behalf in the settlement and held by the trustees upon trust for sale with the father's consent during his life and after his death at the discretion of the trustees. Upon the father's death in 1917 the question arose whether the testatrix's interest in the settlement funds represented by the freeholds was "personal estate" within the meaning of Lord Kingsdown's Act so as to pass under her French will, or whether it passed under her earlier English will:—

Held (reversing the decision of Peterson J.) that, the interest of the testatrix in the trust funds represented by the freeholds was personal estate within the meaning of Lord Kingsdown's Act, and was effectually disposed of by the French will of 1904.

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By a marriage settlement made in 1857, the husband and wife respectively settled certain reversionary interests upon trust, in the events which happened, after the death of the survivor of them for the issue of the intended marriage in such shares and proportions as the husband and wife should by any deed or deeds jointly direct or appoint.

The settlement empowered the trustees, at the request in writing of the husband and wife during their joint lives and of the survivor during his or her life, after the funds had fallen

into possession to invest them in the purchase of messuages, lands, tenements, or hereditaments in England or Wales of freehold or copyhold tenure or leaseholds having an unexpired residue of not fewer than seventy years, and it was thereby declared that " the trustees shall with such consent as aforesaid and after the decease of the survivor of the" husband and wife " at the discretion of the trustees resell " the same and stand possessed of the proceeds of sale upon and for the same trusts, intents and purposes, and with and subject to the same powers and provisions, including the power of purchasing hereditaments, as would be then subsisting and capable of taking effect in the trust funds if they had not been converted into money and invested in the purchase thereinbefore mentioned, and the hereditaments so to be purchased should in the meantime be considered as personal estate.

By a deed poll dated March 8, 1868, the husband and wife jointly appointed that after the death of the survivor of them the trustees of the settlement should stand possessed of the trust funds and property subject to the trusts thereof in trust for the six children of the marriage, all of whom attained the age of twenty-one years. One of them, a daughter, on July 16, 1884, intermarried with the defendant Neville Alexander Innis Gibbs. In 1895 she made a will in English form appointing her father and her brother, the plaintiff R. N. Lyne, her executors and trustees, and, after bequeathing certain legacies and an annuity to her husband, she gave all the residue of her estate to her two children the defendants N. E. Gibbs and C. A. Gibbs in equal shares. In the same year Mrs. Gibbs separated from her husband, and from that time to her death in 1907, except for some short visits to England, she continued to reside in France. By a holograph unattested will made in France on June 21, 1904, she purported to dispose of her property in the following words : " I leave all I possess and all to come to me on the death of my father to my dear friend " the defendant de la Ferté " together with the furniture and effects for his life and to will as he pleases."

Mrs. Gibbs died in December, 1907, and the French will of June 21, 1904, was on February 7, 1910, held by Sir John

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Bigham P.—in *Lyne* v. *de la Ferté* (1)—to be a good will according to the law of France, and letters of administration with that will annexed were granted by him to the defendant de la Ferté under Lord Kingsdown's Act, but, inasmuch as the will was under that Act operative only so far as it related to personalty, his Lordship also admitted the English will of 1895 to probate, as property which did not pass by the French will of 1904 under Lord Kingsdown's Act would pass by the English will of 1895.

Mrs. Gibbs' father, the surviving tenant for life under the settlement of 1857, died in April, 1917. At his death the property subject to the settlement comprised (inter alia) a freehold farm and freehold ground rents purchased by the trustees under their above-mentioned power. The freehold farm had been purchased by the trustees long before the death of Mrs. Gibbs in 1907, but it did not appear from the evidence whether the freehold ground rents were purchased before or after that event.

This was a summons by the trustees of the settlement for the determination (inter alia) of the question whether the freehold farm and ground rents ought to be treated as personal estate and were personal estate within the meaning of the Wills Act, 1861 (Lord Kingsdown's Act), and whether the beneficial interest therein was disposed of by either, and which, of the two wills of Mrs. Gibbs.

The summons was heard before Peterson J. on June 5, 1918.

Lavington for the plaintiffs.

Tomlin K.C. and *J. V. Nesbitt* for Mrs. Gibbs' children. We claim the proceeds of sale of the freehold property under the will of 1895. They are not "personal estate" within the meaning of Lord Kingsdown's Act. That was an Act to amend the law with respect to wills of personal estate made by British subjects only, and that law was contained in the Wills Act, 1837: Carson's Real Property Statutes, 2nd ed. p. 483. The later Act does not define "personal estate," but both "real estate" and "personal estate" are defined in s. 1 of the Wills

(1) (1910) 102 L.T. 143.

Act, 1837, and the former includes all interests in real estate except leaseholds and interests in chattels real, both of which are included in "personal estate." The holograph unattested Italian will of a naturalized British subject was held in *In re Grassi* (1) to be effective under Lord Kingsdown's Act to pass leaseholds in England as being "personal estate," but they are within the express definition of personal estate in the Wills Act, 1837. The proceeds of sale of freeholds are not personal estate, but an "interest in land." In *Miller* v. *Collins* (2) it was held that a married woman's interest in moneys secured by mortgage of real estate was an interest in land within s. 77 of the Fines and Recoveries Act, and a similar interest was within the Mortmain Act: *In re Watts.* (3) In the Irish case of *Murray* v. *Champernowne* (4) it was held that the proceeds of sale of real estate in Ireland which had not been sold were, notwithstanding the trust for sale, to be regarded as land, and that the validity of the will dealing with them must be determined by the law of Ireland. That was a direct decision on the construction of the Wills Act, 1837, to the effect which we ask the Court to adopt in this case.

We submit that the French will did not operate to pass these proceeds of sale, but that they are disposed of by the English will of 1895.

Owen Thompson for the defendant husband of Mrs. Gibbs. I adopt the same line of argument. At the time of Mrs. Gibbs' death the trust for sale was not operative, because the consent of the tenant for life was necessary before the land could be sold. When she died this property was real estate, and the equitable doctrine of conversion does not affect the question or concern the application of Lord Kingsdown's Act.

J. Pawley Bate for the defendant de la Ferté. This property was personalty to begin with, and the power to convert it into realty was temporary only and ended with the death of the surviving tenant for life when the mandatory trust for sale, "shall resell the same," came into operation. The result is that the interest which Mrs. Gibbs had was never real estate

(1) [1905] 1 Ch. 584.
(2) [1896] 1 Ch. 573.
(3) (1885) 29 Ch. D. 947.
(4) [1901] 2 I. R. 232.

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or anything else than an interest in the proceeds of sale. All she had was an interest in certain moneys at the death of her father, and it is immaterial where the money came from. In *Murray* v. *Champernowne* (1) there was a question whether the will was a good appointment, and Lord Kingsdown's Act was never referred to. That case dealt with the validity of the will and is no authority in the present case, where there is no question of invalidity.

This French will disposes of " all to come to me at the death of my father," and there was nothing but " moneys " to come to her in respect of her share of the settlement funds which fell into possession at her father's death, and " moneys " are expressly within the definition of " personal estate " in s. 1 of the Wills Act, 1837.

Tomlin K.C. in reply. *Cur. adv. vult.*

June 18. PETERSON J. The first question raised by the present application involves the determination of the question what is included in the words " personal estate " in Lord Kingsdown's Act (24 & 25 Vict. c. 114). [His Lordship stated the facts and continued :] Part of the property comprised in the settlement of 1857 consisted at the date of Mrs. Gibbs' death of a freehold farm in which a portion of the trust funds had been invested under the provisions of the settlement. The evidence shows that in 1917, when Mrs. Gibbs' father died, the investments subject to the trusts of the settlement comprised this farm and also some freehold ground rents, but I do not find any evidence on the question whether the ground rents had been purchased before Mrs. Gibbs' death. As the question to be determined is whether for the purposes of Mrs. Gibbs' will her interest in the proceeds of sale of freeholds which at the time of her death were held under the settlement of 1857 in trust for sale is personal estate within s. 1 of Lord Kingsdown's Act, it is manifest that, so far as the freehold ground rents are concerned, the question does not arise if they were not purchased by the trustees of the settlement of 1857 before Mrs. Gibbs' death. If at that time they had not been

(1) [1901] 2 I. R. 232.

acquired the funds which were subsequently applied in purchasing them were at Mrs. Gibbs' death unquestionably personal estate within Lord Kingsdown's Act and Mrs. Gibbs' interest in them was caught by the will of 1904, and the fact that after Mrs. Gibbs' death they were applied in purchasing real estate cannot affect the question whether they were personal estate at the time of her death. If, on the other hand, these ground rents were purchased before Mrs. Gibbs' death, the question whether her interest in them was personal estate within Lord Kingsdown's Act is governed by the same considerations as those which affect her interest in the farm or proceeds of sale of the farm.

The question to be determined is whether a beneficial interest under a settlement under which real estate is held in trust to sell and divide the proceeds of sale is personal estate within the meaning of Lord Kingsdown's Act. Apart from Lord Kingsdown's Act the law stands thus. A will so far as it purports to dispose of immovable property must comply with the formalities prescribed by the law of the country where the property is situated, while so far as it relates to movable property of the testator it must comply with the formalities required by the law of the testator's domicil. The result of this rule was that where a British subject domiciled in England made a will in France which was good according to French law but did not comply with the requirements of the Wills Act, 1837, it was, according to English law, inoperative to pass his real estate in England or his personal estate, for so far as his real estate was concerned it did not comply with the requirements of the lex situs, and so far as the personal estate was concerned it did not fulfil the requirements of the lex domicilii. In these circumstances Lord Kingsdown's Act was passed in 1861. Sect. 1 of that Act provided that, so far as personal estate was concerned, the will of a British subject, whatever his domicil might be, should be held to be well executed for purposes of probate if it was made according to the law of the place where it was made, or according to the law of the place where the testator was domiciled when he made the will, or according to the law then in force in that part of the British dominions

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where he had his domicil of origin. The result in the present case was that the will of Mrs. Gibbs, which she made in 1904 in France, complying as it did with the laws of France, was, so far as her personal estate was concerned, admitted to probate in this country although it did not comply with the requirements of the Wills Act. The question now is, what is the personal estate of Mrs. Gibbs which was affected by the French will of 1904 ?

It is to be observed that the Act of 1861 speaks of personal estate, and not movable property. Now the Act of 1861 is expressed to be an Act to amend the law with regard to wills of personal estate made by British subjects, and it does in fact amend the Wills Act of 1837. The Act of 1837 contains a definition or interpretation section which deals with the meaning of the words " real estate " and " personal estate." The words are: " The words ' real estate ' shall extend to manors, advowsons, messuages, lands, tithes, rents, and hereditaments whether freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal, or personal, and to any undivided share thereof, and to any estate, right, or interest (other than a chattel interest) therein; and the words ' personal estate ' shall extend to leasehold estates and other chattels real, and also to monies, shares of Government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator, and to any share or interest therein." In my judgment, in order to ascertain the meaning of the words " personal estate " in Lord Kingsdown's Act reference should be made to the interpretation of the words " real estate " and " personal estate " in s. 1 of the Wills Act of 1837. This is the view which commended itself to Buckley J. in *In re Grassi* (1), where he held that, as personal estate by the Wills Act included leaseholds and chattels real, a will of a British subject executed in Italy in accordance with the requirements of Italian law operated under Lord Kingsdown's Act upon leasehold property in

(1) [1905] 1 Ch. 584.

England. A similar result was reached in *In re Watson* (1), but if the report, which is very brief, in that case is accurate, North J. seems to have held that English leaseholds passed by virtue of the use of the words "personal estate" in Lord Kingdown's Act without reference to the interpretation section in the Wills Act.

Now, turning to s. 1 of the Wills Act, 1837, I find that "real estate" includes all hereditaments and "any estate, right, or interest (other than a chattel interest) therein"; and it is obvious that what is by the section included in real estate is intended to be excluded from personal estate. The question, then, is whether a share of the proceeds of sale of the freeholds held upon a trust for sale which has not been executed is an interest in the freeholds. In cases to which the Act of 1861 does not apply it has been held that wills which deal with the proceeds of sale of real estate devised upon a trust for sale which has not been executed are governed by the lex situs. Thus in *Freke* v. *Lord Carbery* (2) a domiciled Irishman died in 1845 having bequeathed his general personal estate upon trusts for accumulation extending beyond the period allowed by the Thellusson Act, which does not apply to Ireland, and having given an English leasehold on trust for sale and to hold the proceeds on the trusts of his general personal estate. So far as his general personal estate was concerned, the trust for accumulation was not impeached, as the Thellusson Act did not apply to Ireland, but it was held by Lord Selborne that the proceeds of sale of the English leasehold must be governed by the law applicable to the leasehold itself and were subject to the restrictions imposed by the Thellusson Act. This case related to the will of a testator who died before the Act of 1861 was passed, and was therefore, by virtue of s. 5, not subject to the provisions of the Act. It shows that, apart from the Act of 1861, the proceeds of sale of land devised on trust for sale were governed by the lex situs. So, too, in *Murray* v. *Champernowne* (3) a testator who at his death in 1865 was domiciled in Scotland had a general power of appointment

(1) (1887) 35 W. R. 711.
(2) (1873) L. R. 16 Eq. 461.
(3) [1901] 2 I. R. 232

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over the proceeds of sale of Irish real estate which had been settled upon trust for sale. By his will executed in Scotland, which complied with the requirements of the Wills Act, 1837, but was invalid according to Scottish law, he gave all the residue of his property to his wife. Andrews J. held that the interest in the proceeds of sale of the real estate in Ireland which had not been sold was, notwithstanding the trust for sale, to be regarded as land, and therefore the invalidity of the will by Scottish law was immaterial, as the question being one which related to Irish land must be determined by the law of Ireland. In that case the effect of Lord Kingsdown's Act does not seem to have been discussed, probably in consequence of the decisions in *In re Kirwan's Trusts* (1) and *Hummel* v. *Hummel.* (2) If the proceeds of sale of the Irish land which had not in fact been sold were to be considered as personal estate, the validity of the will must have been decided according to Scottish law, which was the law of the domicil; but it was held that, as the interest in the proceeds of sale of the Irish land which had not been sold was an interest in Irish land, the validity and effect of the will were, notwithstanding the trust for conversion, to be determined by the lex situs.

These decisions involve the proposition that an interest in the proceeds of sale of land devised on a trust for sale which has not been executed is an interest in land. So, too, it has been held that a similar interest is an interest in land within the Fines and Recoveries Act: *Briggs* v. *Chamberlain* (3); *In re Jakeman's Trusts* (4); *Tuer* v. *Turner* (5); and also within the Mortmain Act, 9 Geo. 2, c. 36: see the cases collected in Tudor on Charities and Mortmain, 4th ed. p. 450. In the same way, under these Acts a person beneficially interested in a mortgage debt secured on land has an interest in land: *In re Watts* (6); *Miller* v. *Collins.* (7) In my view, then, an interest in the proceeds of sale of land devised on trust for sale is an interest in land, and as the only interest in hereditaments which by the Wills Act, 1837, is excluded from the definition of

(1) (1883) 25 Ch. D. 373.
(2) [1898] 1 Ch. 642.
(3) (1853) 11 Hare, 69.
(4) (1883) 23 Ch. D. 344.
(5) (1855) 20 Beav. 560.
(6) 29 Ch. D. 947.
(7) [1896] 1 Ch. 573.

real estate is a chattel interest, in my judgment an interest in the proceeds of sale of real estate devised upon a trust for sale which has not been executed is an interest in real estate. Consequently Mrs. Gibbs' interest in the proceeds of sale of the English real estate which was at the time of her death subject to the trust for sale was not an interest in personal estate within the meaning of Lord Kingsdown's Act, and was not affected by the French will of 1904, but passed under the will of 1895.

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The defendant de la Ferté appealed. The appeal was heard on October 25, 28, 29, 1918. C. A.

Maugham K.C. and *J. Pawley Bate* for the appellant. The object of Lord Kingsdown's Act (24 & 25 Vict. c. 114) was to render admissible to probate wills which would not otherwise have been admissible. It concerns only the formal validity of wills.

The words "personal estate" in s. 1 of the Act are not to be construed as having any unusual or limited meaning. The property in question in this case is clearly personal estate. It is an equitable chose in action which vests in the executor. The interest of the testatrix is not a right to land, but to money. Her will is a disposition of personal estate, and this interest is clearly personal estate within Lord Kingsdown's Act: *In the Goods of Gunn* (1), *Attorney-General* v. *Marquis of Ailesbury.* (2)

Land subject to a trust for conversion is liable to probate duty, being personal estate which vests in the executor: *In re Smyth.* (3)

There is no definition of "personal estate" in Lord Kingsdown's Act, but the words are defined in s. 1 of the Wills Act, 1837, as extending to "leasehold estates and other chattels real . . . . debts, choses in action . . . . and all other property whatsoever which by law devolves upon the executor," and it is submitted that this interest comes within that definition.

(1) (1884) 9 P. D. 242. (2) (1887) 12 App. Cas. 672, 693, 695.
(3) [1898] 1 Ch. 89.

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It is said that this is an interest in land, and therefore is "real estate" within the Act of 1837. But it is not an interest in land; and if it is, it is a chattel interest, and that is "personal estate" within the definition in the Act of 1837. Then it is suggested that a gift of land to be converted into money is bad under the Mortmain Act; but a gift of money invested on mortgage of land is personal estate, although in one sense it may be an interest in land.

The question is: what is "personal estate" within Lord Kingsdown's Act? *Murray* v. *Champernowne* (1) does not touch the point here. *Freke* v. *Lord Carbery* (2) really supports the appellant's case.

There is, however, no reason to resort to the Wills Act, which is not incorporated by, nor is it to be read with, Lord Kingsdown's Act.

Lord Kingsdown's Act modifies the English rules interpretative of the comity of nations. It does not amend the Wills Act.

[DUKE L.J. referred to s. 9 of the Wills Act. That language strikes at your contention.]

That section merely states the English formalities of testation; Lord Kingsdown's Act says when the English or other formalities of testation are required.

The Act of 1852 did not alter the Wills Act, and its short title is: The Wills Act Amendment Act, 1852; the short title of Lord Kingsdown's Act (The Wills Act, 1861) does not refer to the Wills Act at all.

We admit that for the purposes of the Mortmain Act this is an interest in land. So, too, if the will offended against the law as to accumulations we should admit that the interest was an interest in land.

In *Lewis* v. *Lewis* (3) it was held that land devised upon trusts for conversion, and taken in its converted state, was not an "interest in land" within Locke King's Act (17 & 18 Vict. c. 113). But the question is whether it is none the less a chattel interest in land.

(1) [1901] 2 I. R. 232. (2) L. R. 16 Eq. 461.
(3) (1871) L. R. 13 Eq. 218.

The law at the date of Lord Kingsdown's Act is summarized in Lewin on Trusts, 10th ed., ch. 32, s. 1, p. 1160: "If an estate be directed or agreed to be sold, and the proceeds be made payable to A., the property, though unconverted at A.'s decease, will pass by a general bequest of all his personal estate; and upon A.'s death, will vest in his personal representatives, and will be liable to probate [or estate], and legacy duty. And the result will be the same though the conversion is by the terms of the instrument of trust not to take place until after A.'s death."

An anomaly would result if the decision in the Court below is to stand. Personal estate would mean one thing within the will and another thing as regards externals.

Murray v. *Champernowne* (1), which was relied upon by the judge in the Court below, was the converse case to the present case. There the testator was the full owner. That case is no authority on Lord Kingsdown's Act, which was not there mentioned. It entirely depended on the distinction between movables and immovables. The question here is whether a will of personal estate valid according to the lex actus is valid in England.

[DUKE L.J. Have you any means of showing what was the mischief sought to be remedied by the Act?]

Yes; Lord Kingsdown's Act restored the old rule of locus regit actum as far as it applied to wills governed by the Act, a rule which had been subverted in *Stanley* v. *Bernes.* (2) It makes the rule apply to British subjects.

[EVE J. Why do you say that it is a chattel interest in land?]

Because it passes to the personal representative. The governing words of the definition of personal estate in the Wills Act are "and all other property whatsoever which by law devolves upon the executor or administrator."

Tomlin K.C. and *J. V. Nesbitt* for Mrs. Gibbs' children. It is not suggested that under the equitable doctrine of conversion land subject to a trust for conversion is not personal estate for the purposes of administration. It is submitted

(1) [1901] 2 I. R. 232. (2) (1830) 3 Hagg. Ecc. 373.

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that Lord Kingsdown's Act is undoubtedly an Act which (inter alia) amends the Wills Act. See, for example, ss. 9 and 20.

The particular rule of international law which a country adopts is part of its municipal law. All rules enforced by British Courts are part of our municipal law. Those rules include rules of private international law which the Courts of this country enforce with regard to particular subject matters. The view taken in *In re Grassi* (1) that in considering the effect of Lord Kingsdown's Act you are entitled to look at the definition clause in the Wills Act is the true view.

An interest in the proceeds of sale of real estate is incapable of being described as a chattel interest. Chattels real are leaseholds, long terms of years, and estates in land which are not freeholds. All that is excluded from the definition of "real estate" is a chattel interest. Under s. 77 of the Fines and Recoveries Act, 1833 (3 & 4 Will. 4, c. 74), it has been held that the interest of a married woman in money secured by mortgage of real estate is an interest in land: *Miller* v. *Collins*. (2) So also money invested on mortgage of real estate has been held to be an interest in land within s. 3 of the Mortmain Act (9 Geo. 2, c. 36): *In re Watts*. (3)

[SWINFEN EADY M.R. In substance your argument is that personal estate in Lord Kingsdown's Act means personalty other than chattels real?]

Yes. Having regard to the definition of real estate in the Wills Act such an interest as we are now considering would fall within that definition. Lord Kingsdown's Act was passed to meet the difficulty in obtaining probate of certain wills. The jurisdiction of the Probate Court extends only to personal estate.

Lord Kingsdown's Act deals with the formalities which enable probate to be obtained where the will is executed in accordance with the Wills Act. In *In the Goods of Gunn* (4) it was held that where freehold property was, by the doctrine of equitable conversion, to be considered as personalty, it

(1) [1905] 1 Ch. 584, 592.
(2) [1896] 1 Ch., 573.
(3) 29 Ch. D. 947.
(4) 9 P. D. 242.

was liable to probate and legacy duty, and that a will disposing of it was entitled to probate. In *Attorney-General* v. *Marquis of Ailesbury* (1) Lord Macnaghten said: "In connection with this point it is to be observed, that although the Probate Court never recognised the doctrine of equitable conversion, a different view is now taken in the Probate Division." In 1861 this will, even if it had been executed in accordance with the Wills Act, and had dealt with this subject-matter, would not have been admitted to probate.

[SWINFEN EADY M.R. referred to *In the Goods of Barden.* (2)

DUKE L.J. referred to *In the Goods of Bootle.* (3)]

The Court of Probate, not recognizing the equitable doctrine of conversion, looked at the property as it stood: *In the Goods of Gunn.* (4) And if found that it was in fact land, it would hold that it could not deal with it. In *Tucker* v. *Phipps* (5) it was held that there was no occasion to prove a will in the Spiritual Court to entitle a legatee to recover a legacy out of real estate. *In the Goods of Barden* (6) did not deal with the question of equitable conversion. Proceeds of sale of land are governed by the lex situs. Sect. 11 of the Wills Act is confined to soldiers' and sailors' wills.

[DUKE L.J. referred to *Attorney-General* v. *Brunning.* (7) Your argument appears to have been put there.]

The definition of "real estate" is, in the widest language, to include anything connected with real estate, excluding chattel interests. It is submitted that a mortgage of real estate to secure a sum of money would be real estate within the definition. We ask the Court to apply the ordinary ejusdem generis rule. An assignment of "all my interests in land" would include proceeds of sale of land. The definition of personal estate is intended to exclude all interest in land except those that are expressly excepted from the definition of real estate—namely, chattel interests. It is not contended that this is not personal estate in the ordinary sense. It is a puzzle in any way the Court decides. We

(1) 12 App. Cas. 672, 696.
(2) (1867) L. R. 1 P. & M. 325.
(3) (1874) L. R. 3 P. & M. 177.
(4) 9 P. D. 242.
(5) (1746) 3 Atk. 358.
(6) L. R. 1 P. & M. 325.
(7) (1860) 8 H. L. C. 243.

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are asking the Court to decide the point in a way which will reduce the puzzle to a minimum.

Owen Thompson for the husband of Mrs. Gibbs. My interest is the same as that of the respondent children. It is said that Lord Kingsdown's Act is not an amendment of the Wills Acts, but Lord Kingsdown's Act is intituled "An Act to amend the Law with respect to Wills of Personal Estate made by British Subjects," and the Wills Act is itself an Act for the amendment of the law of wills. The Act contains a code of law relating to wills which is, in fact, amended by Lord Kingsdown's Act, although it is not so stated. Sect. 11 of the Wills Act enables a soldier on actual military service to make a will of "personal estate." Personal estate in that section must be personal estate within the definition. Here the persons interested under the settlement have a right to go to the trustees and say that they desire that the land should not be sold. If after such a request the trustees were to sell the land they would be guilty of a breach of trust. The property here is, therefore, real estate. There is here an equitable estate which is capable of being converted into real estate, and this will would become part of the title of the property if sold.

[SWINFEN EADY M.R. referred to *Budge* v. *Andrews.* (1)]

The decision in that case may have been correct as between those two Acts there construed; but here the words "personal estate" are used in two related Acts, and ought to be interpreted in the way defined in one of them—that is, "personal estate" should have the same ambit in both of the Acts. *Chandler* v. *Pocock* (2) is a governing authority as to the meaning of personal estate in the Wills Act. It is the converse case to the present. There the Court of Appeal had to construe what was personal estate within the meaning of the Wills Act; and in construing what was personal estate within the meaning of that Act it looked not at what the property ought to be but at what in fact it was. See also *In re Wernher.* (3)

Lavington for the trustees of the settlement.

(1) (1878) 3 C. P. D. 510, 521.
(2) (1880) 15 Ch. D. 491; (1881) 16 Ch. D. 648.
(3) [1918] 2 Ch. 82, 90.

J. Pawley Bate in reply. That proceeds of sale are not land is illustrated by *Du Hourmelin* v. *Sheldon.* (1) There certain real estate was devised to trustees upon trust to sell and divide amongst a class, some of the members of which were aliens, and it was held that the aliens were entitled to their share of the proceeds of sale, although as the law then stood they would not have been entitled to a share of the land.

Three points arising out of the argument may be made :—

1. The words " Other than a chattel interest " in the definition of real estate in the Wills Act are synonymous with the words " interest capable of being inherited " in the Inheritance Act.

2. It was said that the interest of Mrs. Gibbs in the freehold part of the blended fund was real estate, because she and the other persons could have required the trustees not to sell. But, had such an arrangement been made after the death of Mrs. Gibbs, it would have been made by her personal representative and not by her real representative.

3. On the question whether Lord Kingsdown's Act is an Act to amend the Wills Act. Suppose there had been a preamble to the former Act, it would not have referred to the Wills Act, but to English rules of private international law.

[SWINFEN EADY M.R. It is not in pari materia with the Wills Act.]

SWINFEN EADY M.R. This is an appeal from an order made on an originating summons by Peterson J., and it raises the question whether a holograph will in French form of a Mrs. Gibbs, which has been admitted to probate, and which for the purposes of this appeal is to be treated as a valid will in all respects, operated to dispose of a certain interest that she had arising under her father and mother's marriage settlement. That settlement was executed in 1857, and by its terms money was settled and authorized to be invested in real estate, subject to a trust for reconversion

(1) (1838) 1 Beav. 79; (1839) 4 My. & Cr. 525

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and dealing with the proceeds as money. Pursuant to a power contained in the settlement, the funds, subject to the trusts of the settlement, were appointed by a deed poll dated March 8, 1868, amongst the six children of the marriage, of whom Mrs. Gibbs, the testatrix, was one. The father of the testatrix was then living, and did not die until April, 1917. Mrs. Gibbs made two wills—a will in English form, made in 1895, and a holograph will, made in France in 1904. It is not disputed that the will of 1904 was valid as regards its execution, having regard to the provisions of Lord Kingsdown's Act. Mrs. Gibbs was a British subject, and she made her will according to the form required by the law of the place where it was made.

The question which arises is: was it effective to dispose of this interest? It was admitted to probate with the earlier will by the judgment of the Probate Court in England on February 7, 1910; but that only establishes its validity as a will, and the question still remains whether the testatrix's interest under the settlement was effectively disposed of by it. It is not disputed that the language of the will was sufficient to dispose of it as a matter of construction. The testatrix purported to dispose of it, and it was undisposed of only if it was property that was not within Lord Kingsdown's Act. Lord Kingsdown's Act applies only to personal estate. Sect. 1 provides: "Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall as regards personal estate be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required . . . . by the law of the place where the same was made. . . . ." The question arising on this appeal is whether the interest under the marriage settlement was personal estate within the meaning of Lord Kingsdown's Act. What was this interest? It was a one-sixth share of the proceeds of sale of property which at that time was land. Under the settlement, money had

been brought into settlement, and there was a power in the settlement to invest in land with a trust for re-conversion. Part of the settled funds was invested in a freehold farm and freehold ground rents; but it was all subject to the trust for re-conversion. What, then, was Mrs. Gibbs' interest? It was a right to have the trusts of the settlement carried out, and a right, therefore, to receive a sixth part of the net proceeds of sale as money. It was urged that no re-conversion had yet taken place, and that Mrs. Gibbs and the other children, or their representatives, could together have agreed that the freehold property should not be resold, and have elected to take it as land. They never did so, however; and when no election has in fact been made, it might just as well have been argued that money ought to be treated as land because the persons entitled to it could have invested it in land. A test that might be applied was this: If the property was owned by someone who died intestate, to whom would it pass? Clearly it would have passed to the personal representative; and so clear was this that it was not disputed that, in ordinary language, Mrs. Gibbs' interest was personal estate—namely, money to arise from the sale of real estate. That, however, does not entirely dispose of the case, because the question is whether Mrs. Gibbs' interest was personal estate within the meaning of Lord Kingsdown's Act; and it was said that, although in ordinary parlance it was personal estate, regard must be had to the definition of that expression in the Wills Act. It is said that Lord Kingsdown's Act was an Act to amend the Wills Act, or was, at any rate, in pari materia with it, and that the expression "personal estate" in Lord Kingsdown's Act must be interpreted by reference to the definitions of personal and real estate in the Wills Act. Sect. 1 of the Wills Act says "that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows": then follow the definitions of "real estate" and "personal estate" which have been read more than once

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in the course of the argument. There is no question that, if you take the definition of personal estate, the interest in question here is personal estate within the definition, which provides that personal estate shall extend to "leasehold estates and other chattels real, and also to monies, shares of Government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator." There can be no doubt that by law this property devolves upon the executors. In *Chandler* v. *Pocock* (1) Cotton L.J. said: "When I look at the words of the Act of Parliament alone, I find it impossible to say that there has not been an exercise of the power as regards this fund, for it is personal estate, that is to say, it is property which, but for the will, would pass by law to and devolve upon executors and administrators." So here this interest, by law, would pass to, and devolve upon, the executors and administrators.

Then it is said that this interest is an interest "other than a chattel interest" in real estate, and so comes within the definition of real estate in the Wills Act. In my opinion, assuming that regard has to be had to the Wills Act in the construction of Lord Kingsdown's Act, the two expressions "real estate" and "personal estate," as defined in the Wills Act, are mutually exclusive. An interest cannot at the same time be both real and personal estate within the Wills Act, and in my opinion this is clearly personal estate within the meaning of that Act. We have heard a good deal of argument as to the meaning of "personal estate" in Lord Kingsdown's Act on the assumption that the language was different from what it is, and that a distinction was drawn by it between movables and immovables. But that is not the language of the Act. The distinction drawn is between real estate and personal estate, and not between movables and immovables.

There has also been a good deal of argument as to the difference between pure and impure personalty; and it is

(1) 16 Ch. D. 648, 653.

said that the proceeds of sale of real estate savour of realty within the cases under the Mortmain Act. But, again, what have we to do with that? It was said that, having regard to the fact that interests in land are governed by the lex situs, the curious result would follow, if the proceeds of sale of land held upon trust for sale are not to be regarded as land, that the validity of the will would be governed by one law and the validity of the disposition by another; but it is conceded that such is the case with regard to leaseholds. Leaseholds are personal estate within Lord Kingsdown's Act—it has been so decided—and they are obviously so within the Wills Act; and yet in *Freke* v. *Lord Carbery* (1) it was decided that the validity of a bequest of leaseholds is governed by the lex situs.

In my opinion some assistance is derived from the law formerly applicable to gifts of the proceeds of sale of realty to aliens. In *Du Hourmelin* v. *Sheldon* (2) it was decided that where land was given on trust for sale and the proceeds were to be divided between the members of a class, some of whom were aliens, the aliens could take, although the law then was that an alien could not take a devise of land; and it was pointed out that the incapacity of aliens to take land was founded on reasons connected with the feudal system, and not applicable to money, and that the proceeds of sale of land were money.

In my opinion an interest in the proceeds of sale of realty held upon trust for sale is personal estate within the Wills Act and Lord Kingsdown's Act, and that being so the will of 1904 was effective to dispose of Mrs. Gibbs' interest under the settlement.

I am of opinion that the judgment below ought to be reversed, and that it ought to be declared that interest in question is personal estate within Lord Kingsdown's Act.

DUKE L.J. I am of the same opinion. If Lord Kingsdown's Act had stood alone the learned argument with which the Court has been occupied could not have been

(1) L. R. 16 Eq. 461. (2) 1 Beav. 79.

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sustained for ten minutes. I see no ground, either in law or common sense, for doing anything to limit the beneficial operation of Lord Kingsdown's Act. The object of the Act is clear. It was passed at a time when with extended facilities for travelling difficulties had arisen in cases of persons with property in England who could not obtain advice from persons familiar with the intricacies of English law ; and it was passed to alleviate those difficulties. Now, it was said that the operation of the Act must be limited to giving effect to the complex definitions of personal estate and real estate in the Wills Act on the ground that Lord Kingsdown's Act amended the Wills Act, or, at any rate, was in pari materia with it. In a sense this was true. The Wills Act was an Act to amend the law with regard to wills, and so, too, was Lord Kingsdown's Act. It is necessary, however, in considering the question, to bear in mind the exceptional character of the interpretation section in the Wills Act. It was framed with remarkable care, and did not lay down that "personal estate" and "real estate" were thereafter to have the meaning attributed to them there. It provided that "the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows" ; and then it went on to say that "real estate" was to extend to certain forms of property, and that "personal estate" was to extend to certain others, in each case making the definitions as comprehensive as possible. I agree with the Master of the Rolls in thinking it incontestable that the definitions of "personal estate" and "real estate" are mutually exclusive, and that, in the definition of personal estate, the governing words are the concluding words of the definition "all other property whatsoever which by law devolves upon the executor or administrator, and to any share or interest therein."

In my judgment the property here in question was not an interest in real estate. It would not have passed to the heir, but to the personal representative, and was, to quote

from the judgment of Cotton L.J. in *Chandler* v. *Pocock* (1), "property which, but for the will, would pass by law to and devolve upon executors and administrators."

The Court was pressed with decisions upon the Mortmain Act, but they had no bearing on this will. It was said also that there was a period when the Probate Court would not have admitted to probate a will dealing only with real estate directed to be sold. So be it; but if reference were made to *Attorney-General* v. *Brunning* (2), it became perfectly obvious that this did not depend on the question of the devolution of real estate or personal estate, but was a mere question of administration, and that, notwithstanding the view taken in that case, the executor of a deceased testator was entitled to the assistance of the Court to get in these assets.

I have added these few words to the judgment of the Master of the Rolls because we are differing from the learned judge in the Court below, and because we have heard serious argument on these points.

EVE J. I have arrived at the same conclusion. The property of which the testatrix died possessed was admittedly "personal estate" within the ordinary meaning of that expression. If, therefore, the same meaning is to be attached to it in Lord Kingsdown's Act the judgment below cannot be supported. But it is argued that it must have a restricted meaning imposed on it in that Act by reason of the interpretation clause in the Wills Act, 1837; and it is said that such an interest as we have to deal with here is not within the meaning of that expression. This contention is answered in two ways. First, there is nothing in express terms, or arising out of necessary implication, to warrant us in imposing on this expression in the later Act the statutory meaning impressed upon it by the earlier Act; and secondly, the property here in question is "personal estate" within the definition in the Wills Act, in that it is property devolving upon the executor.

(1) 16 Ch. D. 648, 653. (2) 8 H. L. C. 243

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It follows that the judgment below was erroneous.

Appeal allowed.

Solicitors: *Dixon, Ward & Dixon, for Sewell & Maugham, Paris; Parkers & Hammond; Dunn & Wilson.*

W. I. C.

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July 9, 10.

In re DAWSON.

SWAINSON v. DAWSON.

[1917 D. 1205.]

Will—Ademption—Gifts to Children and Grandchildren—Advances to Children—Doctrine of Double Portions—Rights of unadvanced Grandchildren.

A grandfather is in the position of a stranger for the purpose of the doctrine against double portions, and grandchildren cannot obtain the benefit of the doctrine in the absence of evidence that the grandfather has placed himself in loco parentis as regards them.

EDWARD BOUSFIELD DAWSON, by his will dated December 11, 1909, appointed his eldest daughter, Mary Philadelphia Dawson, and his great-nephew, Charles Burney Shepherd, executrix and executor and trustees, and devised and bequeathed to the trustees all his real and personal estate, upon trust out of the personalty to pay his debts and funeral and testamentary expenses. After containing provisions with reference to the real estate, the will continued as follows: "And as to my personal estate, I give and bequeath all my furniture . . . . and other chattels in or about Aldcliffe Hall aforesaid to my said daughter, Mary Philadelphia Dawson, her executors, administrators and assigns, and all the rest of my personal property I desire to be divided into five equal parts, and one of such parts I give and bequeath to each of my said daughters, Mary Philadelphia, Lucy Evelyn, and Constance Isabel, their executors, administrators and assigns. One other such part I give and bequeath to my granddaughter, Catherine Mary Howard Dawson, the only

child of my late son, Edward Howard Dawson, the same to be retained in trust for her until she attains twenty-one years of age, when it shall be transferred and assigned to her, with the securities on which it may then be invested, and also all accumulations thereto of income till she reaches that age. But, in case she does not live to attain twenty-one years, I desire that my personal property shall be divided into only four equal parts, for my said three daughters and the children of my said daughter, Helen Margaret Harries, per stirpes, as aforesaid. And the remaining one-fifth I give and bequeath equally among the children of my said daughter, Helen Margaret Harries, to be paid and transferred to them as they respectively attain the age of twenty-one years, and in the meantime the income of their respective shares shall be used for their benefit or invested for them as my said executors or other the trustees or trustee for the time being of this my will deem best."

The testator made three codicils, dated respectively November 24, 1910, September 12, 1914, and June 9, 1915, and by one or more of these John G. Swainson was appointed executor and trustee in the place of C. B. Shepherd, and the testator's daughter, Constance Isabel Hall, was appointed an additional executrix and trustee, but the division and disposal of the residuary personalty were not affected. Except in so far as it altered his will, the testator, by his third codicil, confirmed his will.

The testator died on May 4, 1916. He had been only once married, and the issue of the marriage were a son who died (in 1902) in testator's lifetime without having been married; another son, Edward Howard Dawson, who died in 1896, leaving an only child, Catherine Mary Howard Dawson; a daughter, Helen Margaret Harries, who died in 1907, leaving five children; and three other daughters, Mary P. Dawson, Lucy Evelyn Leeder, and Constance Isabel Hall, all of whom survived the testator.

In the interval between the last codicil and his death he made large gifts to each of his three surviving daughters, by transferring to each of them, on January 21, 1916, shares

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in a limited company, and he also subscribed for, and put into the name of Mrs. Leeder, 1,000*l.* debenture stock of the Mansfield Railway Co.

An originating summons was taken out by J. G. Swainson, one of the executors, against the three surviving daughters, Catherine M. H. Dawson, and the five children of Mrs. Harries, raising the question whether, in the distribution of the residuary personalty, the gifts made by the testator to his three surviving daughters in his lifetime were to be brought into account and taken as a satisfaction pro tanto of the shares of those daughters in the residuary personalty. No question was raised as between the three daughters to whom the gifts had been made.

On the question of fact, whether the testator had placed himself in loco parentis as regarded his five grandchildren who were the children of Mrs. Harries, his Lordship held on the evidence that he had not done so.

Romer K.C. and *Dighton Pollock* for the three surviving daughters of the testator. There is no authority for the proposition of general law that a grandfather stands in loco parentis as regards his grandchildren. The doctrine as to double portions should not be extended.

Ashworth James for the defendant Catherine M. H. Dawson. The three daughters who received advances in the testator's lifetime took their advances pro tanto by way of ademption. The doctrine of double portions cannot be acted on at the instance of a stranger or of the testator's widow: *Meinertzagen* v. *Walters.* (1) Where a child of the testator has died in his lifetime, leaving a child or children, and the estate is divided into parts, children being given each a part and the grandchildren the part which their deceased parents would have had if all the children had been treated impartially, there is no case to show that the grandchildren are to be treated as strangers. Justice requires that they should be allowed to take advantage of the doctrine against double portions. The children of the dead child must be treated as representing their parent.

(1) (1872) L. R. 7 Ch. 670.

This principle of representation is recognized in some cases, for an absolute gift by will is adeemed by a settlement of property upon the usual trusts of a marriage settlement: *Lord Durham* v. *Wharton*. (1) And a legacy to a child for life, with remainder to her children, is adeemed by a gift to the child absolutely: *Kirk* v. *Eddowes*. (2)

[He also referred to Theobald on Wills, 7th ed., p. 768, and *Pym* v. *Lockyer* (3); and Sargant J. referred to *In re Lacon*. (4)]

A. Grant K.C. and *Wilfrid Hunt* for the children of Mrs. Harries. We adopt the argument on behalf of Catherine M. H. Dawson, and in addition point out that in other cases the law recognizes the claims of grandchildren: Statute of Distributions (22 & 23 Car. 2, c. 10), s. 3; *Edwards* v. *Freeman* (5); Wills Act, 1837 (1 Vict. c. 26), s. 33. If there is no general rule that grandchildren cannot claim the benefit of the doctrine against double portions, the evidence here is sufficient to show that the testator placed himself in loco parentis to his grandchildren: *Pym* v. *Lockyer*. (3)

[They also referred to *Ex parte Pye* (6), *Montefiore* v. *Guedalla* (7); *Fowkes* v. *Pascoe* (8); and *In re Heather*. (9)]

Romer K.C. in reply. The argument in favour of the grandchildren, for the extension of the doctrine against double portions, is a bold one for this time of day. The doctrine is approached by admitting that it does not apply in favour of strangers, and then contending that grandchildren are not strangers. The rule is a positive and not a negative one. In *Pym* v. *Lockyer* (3) the testator had in fact placed himself in loco parentis to certain grandchildren, and that case is no authority on the general law. There is no reported case that grandchildren can take advantage of the doctrine, and there is decision or dictum that they cannot do so in *Roome* v. *Roome* (10), where it is laid down that "a

(1) (1836) 3 Cl. & F. 146.
(2) (1844) 3 Hare, 509.
(3) (1840) 5 My. & Cr. 29.
(4) [1891] 2 Ch. 482, 500.
(5) (1727) 2 P. Wms. 435.
(6) (1811) 18 Ves. 140.
(7) (1859) 1 D. F. & J. 93.
(8) (1875) L. R. 10 Ch. 343.
(9) [1906] 2 Ch. 230.
(10) (1744) 3 Atk. 181, 183.

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grandfather to be sure is a very near relation, but strictly speaking does not stand in loco parentis."

[He also referred to *In re Smythies* (1); *In re Scott* (2); *Powel* v. *Cleaver* (3); *Rose* v. *Rogers* (4); and Halsbury's Laws of England, vol. 13, p. 132.]

SARGANT J. (after stating the will and the facts as to the advances). As regards the main question on the summons, the question whether the grandchildren are entitled at all to the benefit of the doctrine against double portions, Miss Catherine Mary Howard Dawson stands in exactly the same position as her first cousins, the children of Mrs. Harries; but those children have also a separate and independent claim, on the ground that the testator placed himself as towards them in loco parentis. The two daughters of the testator who did not receive debenture stock of the Mansfield Railway Co., make no claim as against Mrs. Leeder to have the stock received by her brought into account for their benefit as against her share of the residue. They are satisfied that she should have that sum of stock in addition to her share of residue; and, therefore, I can deal with the case practically on the same footing as if there had only been gifts to each of the three daughters of the shares in the other company.

On the question, which is a pure question of fact, whether the grandfather, the testator, had placed himself in loco parentis as regards the children of Mrs. Harries, I see no reason whatever for coming to the conclusion that he ever did so.

I have, therefore, to deal solely with the question whether, as a matter of general law, the grandchildren of the testator, to whom a share of residue has been left corresponding with the share which their parent would probably have taken had the parent survived, are entitled to enforce the equitable rule against double portions which their parents could have enforced if those parents had been given the share of the residue in question and had survived the testator.

(1) [1903] 1 Ch. 259.
(2) [1903] 1 Ch. 1.
(3) (1789) 2 Bro. C. C. 499, 517.
(4) (1870) 39 L. J. (Ch.) 791.

I have first to see what is meant by "portion" for this purpose, and what is the origin of the rule. In *Ex parte Pye* (1) Lord Eldon L.C. said: "I may state, as the unquestionable doctrine of the Court, that, where a parent gives a legacy to a child, not stating the purpose with reference to which he gives it, the Court understands him as giving a portion; and by a sort of artificial rule, in the application of which legitimate children have been very harshly treated, upon an artificial notion, that the father is paying a debt of nature, and a sort of feeling upon what is called a leaning against double portions, if the father afterwards advances a portion on the marriage of that child, though of less amount, it is a satisfaction of the whole, or in part." It has been held since then that the advance of a smaller sum would only be satisfaction pro tanto, but that is immaterial for the present purpose. In a later part of the judgment Lord Eldon, after referring to *Powel* v. *Cleaver* (2) says this: "If that is right, it comes to this; that, where a father gives a legacy to a child, the legacy, coming from a father to his child, must be understood as a portion, though it is not so described in the will; and afterwards advancing a portion for that child, though there may be slight circumstances of difference between that advance and the portion, and a difference in amount, yet the father will be intended to have the same purpose in each instance; and the advance is therefore an ademption of the legacy; but a stranger, giving a legacy, is understood as giving a bounty, not as paying a debt: he must therefore be proved to mean it as a portion, or provision, either upon the face of the will, or, if it may be, and it seems that it may, by evidence, applying directly to the gift, proposed by that will."

Then, later on again, he says: "Upon the authority of *Powel* v. *Cleaver* (2) unless you can show, that at the time of making the will the testator meant to give a portion as parent, or as standing in loco parentis, and meant to satisfy that in the whole or in part by the subsequent advance, the Court is not authorized by the artificial rules of equity to hold it a satisfaction."

(1) 18 Ves. 140, 151, 153, 154. (2) 2 Bro. C. C. 499.

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In this case Mr. Romer conceded—and I think the contrary is unarguable—that, if the parents of the grandchildren had been living at the date of the will, and had survived the testator, and had been left a share of residue, what was left to the three daughters would have been in the nature of a portion left to them by their parent, and the rule would have applied. But it has been held in *Meinertzagen* v. *Walters* (1) that the rule is one to be applied only for the benefit of the persons as against whom the rule would itself be applied; that is to say, persons who are themselves in the position of taking a portion. And, therefore, I have still to see whether the grandchildren are within the category of persons for whom the testator is in the position of having a moral duty to provide a portion, and would, had they received the subsequent advance, have had to bring the sums advanced to them into account as against their shares of residue. It is to be noticed that Lord Eldon in his judgment carefully limits the relationship of which he is speaking to parents and persons who stand in loco parentis; and, on the ground that a person in that category is paying a debt of nature, he applies the doctrine against double portions only where that relationship exists. The same view was expressed by Turner L.J. in *Montefiore* v. *Guedalla* (2), where he spoke about the intention of the father "twice to discharge the same obligation of providing for his child." And, again, Lord Cottenham L.C., in *Pym* v. *Lockyer* (3), spoke of the "duty which the relative situation of the parties imposes upon the parent."

Does that relationship, which seems to me to be essential for the purpose of raising this doctrine against double portions, exist between a grandfather and a grandchild whose parent is dead? It appears to me that such authority as there is is all against that view. In *Roome* v. *Roome* (4) it is said that a grandfather is not in loco parentis to his grandchild, the child of a deceased son; and though the statement was not necessary for the purpose of the actual decision, because there had been a codicil to the will subsequent to the date

(1) L. R. 7 Ch. 670.
(2) 1 D. F. & J. 93, 103.
(3) 5 My. & Cr. 29, 35.
(4) 3 Atk. 181, 183.

of the advance, and therefore the will was revived, it is at least a clear dictum. Then, again, it was said in *Powel* v. *Cleaver* (1) that a gift by a grandfather was not a portion. And in all the text-books, or those of the text-books that have been cited to me, Jarman on Wills, 6th ed., p. 1160, and White and Tudor's Leading Cases, 8th ed., vol. 2, p. 394, the rule is most carefully limited, in the way that Lord Eldon limited it originally, to cases where the relationship between the parties is that of father and child, or where a person has placed himself in loco parentis. It has often been recognized that the rule in *Ex parte Pye* (2) nearly as often defeats the intention as it gives effect to it, and Bowen L.J. in *In re Lacon* (3) said that the rule was not to be extended; and I can see that great difficulties might arise if one were to depart from the recognized rule in the matter and attempt to extend the rule to all persons whom one might consider to be in such a position that the testator would naturally provide for them in the same way in which he would have provided for a child—as indeed he has provided for these persons by his testamentary dispositions here.

I think I ought to add that, apart from the cases to which I have referred, it is impossible to suppose that, if the rule had applied to grandchildren as distinguished from children, there would not have been examples of it in the books. It is not at all unlikely that a grandparent who is providing for a grandchild by his will should subsequently make some additional provision in his lifetime for that grandchild. The case must have occurred over and over again, and no one has been bold enough hitherto, as far as I can see, to set up that the rule has the wider application now contended for.

In my judgment, therefore, the question asked by the summons must be answered in the negative.

Solicitors: for the plaintiff and surviving daughters, *Robinson & Bradley, for W. H. Satterthwaite, Lancaster;* for the defendant Dawson, *Janson, Cobb, Pearson & Co.;* for the children of Mrs. Harries, *Curwen & Carter.*

(1) 2 Bro. C. C. 499, 517. (2) 18 Ves. 140.
(3) [1891] 2 Ch. 482, 500.

F. E.

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YOUNGER J.

In re ROGERSTONE BRICK AND STONE CO., LIMITED.

SOUTHALL *v.* WESCOMB.

[1917 S. 2548.]

April 24, 25; *June* 12, 13; *July* 26.

C. A. *Oct.* 22, 23.

Mortgage—Leasehold—Assignment of Premises with Fixtures attached—Company—Debentures—Floating Charge—Sale by Mortgagee with Consent of Receiver for Debenture Holders—Severance of Fixtures—Rights of Debenture Holders and Mortgagee in Proceeds of Sale.

A company having a lease of a brickfield issued debentures creating a floating charge and prohibiting the creation of any mortgage to have priority. Any debenture holder was empowered to appoint a receiver with power to make arrangements in the debenture holders' interests. The company requiring money, the debenture holders agreed to the creation of a mortgage of the lease to have priority of the debentures. By that mortgage the company assigned the premises comprised in the lease with erections and plant then or thereafter thereon (so far as legal without registration as a bill of sale) for the residue of the term. The business not succeeding, the mortgagee, being also a debenture holder, appointed a receiver for the debenture holders, who eventually had to close down the works, and an arrangement was entered into between the mortgagee (who was a solicitor) and the receiver for the receiver to offer the loose and fixed plant together for sale, the proceeds of the former to go to the debenture holders and those of the latter to the mortgagee. In an action by a debenture holder claiming that the debenture holders were entitled to all the proceeds of sale in priority to the mortgagee:—

Held, by the Court of Appeal, affirming the decision of Younger J., that the company's interest in the fixtures as mortgagor continued only so long as it had an interest in the term, and ceased on a sale by the mortgagee; that the right, which the mortgage carried, of the mortgagee to remove the fixtures as against the company's lessor at the end of the lease did not render the mortgage obnoxious to the Bills of Sale Acts; that the receiver was under no duty to insist that the removal should be delayed till the end of the term; that the arrangement between the receiver and the mortgagee was beneficial to the debenture holders, and the (solicitor) mortgagee had obtained no undue advantage; and that the action must be dismissed.

The respective rights of mortgagor and mortgagee under a mortgage of a lease of premises with fixtures, and the authorities, considered.

On November 18, 1904, the defendant company took a lease of a brickfield for 21 years with an option to renew. Under it the company was empowered to build, erect, set up and maintain all such engines, machinery, houses, kilns, &c., as might be deemed necessary or expedient for the effective

conduct of brickmaking and other operations to be carried on upon the premises. It contained covenants by the company for payment of rent and royalties, and to carry on the manufacture of bricks to a prescribed minimum in each year during the term, with a right to the lessor to re-enter upon breach or non-observance by the company of any covenant.

On November 11, 1904, the company issued a series of eight first debentures of 100*l.* each, repayable on September 30, 1912. One was held by the plaintiff, two by the defendant Botsford. The company thereby charged in favour of the holders all its property, both present and future, excepting book debts, but condition 1 provided that, although the charge was a floating security, the company was not to be at liberty to create any mortgage or charge on any of its property and assets pari passu with or in priority to the debentures. By condition 12 the registered holder of any debenture, with the consent in writing of at least one other, was empowered, while any principal money or interest remained owing on the security, to appoint a receiver or receivers of the property thereby charged, with power to take possession of the property, to carry on or concur in carrying on the business of the company; "(*c*) to sell or concur in selling any of the property charged by the debentures; (*d*) to make any arrangement or compromise which he or they shall think expedient in the interest of the debenture holders." The money raised by debentures and the proceeds of share capital being insufficient for completing the construction of the brick kilns and other buildings and obtaining the requisite brickmaking plant and machinery, and one Parnall being willing to advance to the company on first mortgage of its lease further moneys for that purpose, seven of the debenture holders, including the plaintiff, on February 25, 1905, signed a memorandum consenting, if and so far as their consent was necessary, to the company creating a mortgage or charge upon the lease, and declaring that all moneys then or thereafter owing on such mortgage or charge should have priority to their debentures. On the same day, by indenture of mortgage made between the company and Parnall, in

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consideration of 500*l.* then advanced by Parnall to the company and of the further sums of 250*l.* and 250*l.* to be advanced, the company covenanted for payment of the 1000*l.* on May 25 then next, with interest until repayment at the rate of 5 per cent. per annum, and the company assigned to the mortgagee all the hereditaments and premises comprised in and demised by the lease "together with all brick kilns brick-making shops sheds offices and buildings and all other erections now or hereafter to be erected upon the said premises And all plant and machinery now or hereafter to be brought upon the said premises (so far as the same can be legally assigned without registration under the Bills of Sale Acts) and all appurtenances to the said premises belonging To hold unto the mortgagee for all the residue now unexpired of the said term of years granted therein by the hereinbefore recited indenture of lease and for any further or extended term which may be granted under the provisions contained in the same indenture," with the usual proviso for redemption, and the company covenanted with the mortgagee to proceed with and complete the erection of the brick kilns and other buildings then in course of erection upon the assigned premises, together with all plant and machinery requisite for the purpose of manufacturing bricks and other similar articles in the most effective and economical manner, the mortgagee being, in case of default, thereby empowered himself to enter and erect and complete such buildings plant and machinery, and the company further covenanted with the mortgagee during the continuance of the security to keep all erections, buildings, plant and machinery comprised therein fully insured against loss or damage by fire. By further indentures Parnall advanced to the company sums amounting to 900*l.*, and subsequently the entire mortgage debt of 1900*l.*, with all securities, was assigned by him to the defendant Botsford. The business of the company not being a success, on or about June 27, 1913, the defendant Botsford, as a debenture holder, with the written consent of another debenture holder, in pursuance of the power vested in him by condition 12 of the debentures, appointed the defendant Wescomb to be receiver of the property charged in and by the

debentures, and with the power and authorities particularly mentioned in the same condition. For a time the receiver continued the business, but unprofitably, and in 1915 he was compelled to close down the works. The lessors did not re-enter for breach of the covenant to work. The receiver was able for a time to pay the rent out of the proceeds of the stock of bricks on the premises and the company's outstanding accounts, but late in 1917, these means being exhausted and no source remaining for discharging the outgoings other than a realization of the company's plant and machinery, the receiver entered into an arrangement with Botsford, whereby the loose machinery and plant, over which the debenture holders' security was paramount, was to be offered by the receiver for sale upon the premises by tender, together with the fixed machinery and plant comprised in the mortgage of the lease, upon the terms that the latter should be removed by the purchasers and the expenses of the sale should be charged rateably against the whole property sold, and that, subject thereto, the proceeds of sale of the loose machinery and plant should be credited to the debenture holders and those of the fixed machinery and plant to Botsford as mortgagee. The sale took place, the whole being purchased by a single purchaser and removed by him, and the sale moneys were, by arrangement, consigned to an account, to abide the decision of this action.

The plaintiff, suing on behalf of himself and all other of the debenture holders, claimed a declaration that he and the other debenture holders were entitled to have the proceeds of sale of the plant and machinery applied in or towards payment of the amount due on the debentures in priority to the claim (if any) of the defendant Botsford as mortgagee.

The action came on for hearing before Younger J. on April 24, 1918.

H. Terrell K.C. and *Topham* for the plaintiff. The mortgagee is entitled in priority to the debenture holders to nothing but the lease: *Ex parte Barclay.* (1) Having stood

(1) (1874) L. R. 9 Ch. 576.

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by and allowed the sale to proceed, he is not entitled to the proceeds: *Gough* v. *Wood & Co.* (1); *Hobson* v. *Gorringe.* (2) The intention of a lease like the present is to exclude everything except what passes as land: Key & Elph. Prec. Conv., 10th ed., Vol. ii., p. 182, Form XXXVII., note (b).

[YOUNGER J. As against the mortgagee the possession of the receiver is the possession of the company.]

The company does not appear. All that the consent of the debenture holders to the mortgage authorized in priority to their own security was a mortgage of the lease. If the mortgage goes further it is not authorized by the debenture holders. It was the duty of Botsford, as a solicitor, in making the arrangement with the receiver to act as if he were dealing with a vendor to a stranger: *Gibson* v. *Jeyes.* (3) Three questions arise: whether, as matter of construction, the mortgagee got a charge on the fixed machinery in priority to the debenture holders; whether, if he did, his right was limited to the term of the lease; and whether, if he had priority, he had power to sell the fixed plant apart from the lease. As to the first question, the fixtures did not pass under the mortgage but remained vested in the company: *Sanders* v. *Davis* (4); *Cumberland Union Banking Co.* v. *Maryport Hematite Iron and Steel Co.* (5)

[YOUNGER J. I think this matter must be treated as if the debenture holders did not exist. The question is what is the interest which a mortgagee by assignment takes in fixed plant upon leaseholds. Is he at the end of the term entitled to that plant, not only as against the lessor, but also against the mortgagor?]

The particular case is what has to be considered, a hypothetical one does not assist. The mortgage here is the assignment of a business—not of land and plant on it, but of a going concern. It is not an absolute assignment of chattels. It was impossible to give anything more than it did except by a document which without registration would have been void under the Bills of Sale Act.

(1) [1894] 1 Q. B. 713.
(2) [1897] 1 Ch. 182.
(3) (1801) 6 Ves. 266, 270.
(4) (1885) 15 Q. B. D. 218.
(5) [1892] 1 Ch. 415.

[YOUNGER J. And perhaps under s. 93 of the Companies (Consolidation) Act, 1908.]

The mortgagee took merely a term; there was no grant to him of either land or plant for more than the term. All he could sell was the term. He has submitted—whether under a mistake or not is immaterial—to a condition of things, i.e., the sale, which cannot now be rectified. Having only the term, he had no right to go in and sever the fixtures: *Ex parte Barclay* (1); *Southport and West Lancashire Banking Co.* v. *Thompson*. (2) The moment the fixtures were removed his interest in them ceased: *Gough* v. *Wood & Co.* (3)

C. J. Mathew K.C. and *Owen Thompson* for the mortgagee. The worst that can be maintained against the mortgagee is that neither of the parties could sell the fixed plant without the consent of the other. The fixed plant passed to the mortgagee by the mortgage: *Reynolds* v. *Ashby & Son*. (4) As assignee, he had the right to remove the fixtures as against the lessor, he being tenant as assignee. The mortgagor gave up his right to sever them from the soil. If the mortgagee had taken express power to sell the fixed plant separately, it would have been void because it would have been a bill of sale and not registered: *In re Yates*. (5) There is in the hands of the receiver a sum which is proceeds of sale of property over which the mortgagee had a first charge, and the mortgagee has a right to it both because the company has given him a first charge and because the debenture holders consented that he should have that charge. There is an absolute right in a mortgagee as tenant to sell fixtures subject to being obliged to remove them before the end of the term: *Ex parte Daglish* (6); *Johns* v. *Ware* (7). Where land with fixed plant on it is demised for a term, the fixed plant is not demised for a term: *Ex parte Barclay*. (1)

[YOUNGER J. Or, rather, the plant is demised absolutely.]

Under a mortgage of a term—whether by assignment or subdemise does not matter—the mortgagee has all the rights

(1) L. R. 9 Ch. 576.
(2) (1887) 37 Ch. D. 64.
(3) [1894] 1 Q. B. 713.
(4) [1904] A. C. 466.
(5) (1888) 38 Ch. D. 112.
(6) (1873) L. R. 8 Ch. 1072, 1082.
(7) [1899] 1 Ch. 359.

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of the mortgagor in the term, including his rights as against the lessor in the fixtures: *Johns* v. *Ware*. (1) Here a business-like arrangement was made for the benefit of all parties.

Topham in reply. If the other side is right the mortgage should have been registered under the Companies (Consolidation) Act, 1908, and, not having been, is void against creditors.

[YOUNGER J. I think it must be construed so as to avoid the necessity of registration as a bill of sale.]

Nothing passed to the mortgagee but the term: *Ex parte Daglish* (2); *Ex parte Barclay*. (3) *Ex parte Quincy* (4) shows the right of a tenant to trade fixtures. After determination of the tenancy he could not remove them because it would be trespass, nor could he maintain trover because they were part of the soil. So long as he was in possession he could remove them. They are absolutely his fixtures. Here neither the receiver nor the mortgagee could sell without the other's consent. *Gibson* v. *Jeyes* (5) shows the general rule of duty in a solicitor to get the best bargain for the party he is advising.

[YOUNGER J. If a mortgagee sells (as he can) both lease and fixtures together, the mortgagor can never, by any means whatever, get the proceeds of the fixtures.]

The mortgagee could sell the fixtures only for the term. If they are severed in any way they revert to the mortgagor. They are the mortgagor's, subject only to this, that he must sever during the term. It is sought to avoid the Bills of Sale Act by making the mortgage only during the term as regards fixed plant. The arrangement was one which cannot stand. Though the condition that the mortgagee was to have the proceeds of sale of the fixtures fails, yet his consent to the sale remains. But, if both consent and condition go, still the plaintiff has a charge on the chattels and the mortgagee has none: *Gough* v. *Wood & Co.* (6); *Reynolds* v. *Ashby & Son*. (7)

Cur. adv. vult.

(1) [1899] 1 Ch. 359, 363.
(2) L. R. 8 Ch. 1072.
(3) L. R. 9 Ch. 576.
(4) (1750) 1 Atk. 477.
(5) 6 Ves. 266.
(6) [1894] 1 Q. B. 713.
(7) [1904] A. C. 466.

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July 26. YOUNGER J. In this action, in form a representative debenture holders' action, the apparent question, stripped of all technicalities, is whether the net proceeds of sale of certain fixed plant and machinery are applicable in or towards payment of the amount due on the first debentures of the defendant company, or whether—subject to the payment thereout of the amount due upon one of these debentures, not, however, the property of the plaintiff—they belong, in priority to the other debenture holders, to the defendant Botsford as mortgagee of the leasehold premises of the company to which, before the sale and removal, the fixed plant and machinery were attached. The really effective dispute is, however, less extensive. It is whether the plaintiff, the holder of one of the eight first debentures of the defendant company—each for 100*l.*—is to be paid his 100*l.* and arrears of interest out of these proceeds of sale in priority to the defendant Botsford's claim under his mortgage. It is open to question whether even now any holder of the other six debentures affected supports the plaintiff in his claim. Active support certainly he has none, and it is not to be doubted that, but for his raising them, none of the questions so fully discussed at the different stages of these elaborate proceedings would ever have been heard of. [The learned judge stated the facts as above and continued.] Now it is not irrelevant to observe that the consent of the debenture holders of February 25, 1905, although expressed in general terms, had, I have no doubt, direct reference to the mortgage of even date executed in Parnall's favour. The consent was, in fact, handed to Parnall, and has remained attached to the mortgage deed ever since. It was, in fact, an invitation to him to advance the moneys without which the company's premises would probably never have been equipped for business and the debenture holders' security never have had a chance of becoming adequate, and it was the intention of the debenture holders, I cannot doubt, that Parnall should have prior to their own the fullest security for his advance, which an unregistered assignment of the lease could give him.

At the trial no witnesses were called on either side, but it was not disputed that to offer the loose plant and machinery

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for sale in conjunction with the fixed plant was calculated to produce, for the former at least, a somewhat better price than if these chattels had been sold separately or alone. Obviously, also, the apportionment of the expenses of sale was a further relief to the debenture holders as owners of the loose plant. These advantages may be claimed for the arrangement so far as they are concerned. On the other hand, it was urged on behalf of the plaintiff, and, I think, with reason, that the lease had become burdensome and, either with or without the fixed plant and machinery, was quite unsaleable. It was, on that, contended that no other method of realizing his security being open to Botsford, the arrangement, impossible without the receiver's consent, was of the utmost value to him, and that, out of it, the debenture holders in the result really secured no adequate advantage nor, indeed, any real advantage at all. On these grounds the plaintiff would, I think, have been prepared to impeach the arrangement notwithstanding the powers of the receiver under condition 12 (d) of the debentures, even in the absence of any further special circumstance. But he had one very special circumstance on which he strongly relied. Botsford is a solicitor, and it was admitted that he was the only solicitor whose advice the receiver had ever taken upon any matter connected with the receivership, and, while it was not admitted, nor was it proved, that the receiver either asked or received from Botsford any advice in relation to the agreement with reference to the sale, the intimacy of the relation between the two was obvious from the fact that it was to Botsford that the receiver owed his appointment. The plaintiff, accordingly, contended that the arrangement was not binding on the debenture holders at all—that the consent to remove the fixtures alone remained binding upon Botsford—with the result, in law, that the proceeds of sale of the whole of them, they having by removal become chattels not, as such, comprised in his security, belonged entirely to the debenture holders. When one recalls the fact that the fixed plant and machinery, the substantial security of the mortgagee, was probably entirely purchased with the money advanced to the

company by the mortgagee upon a security including it, to which the debenture holders expressly postponed their own, it is obvious that a contention which would transfer the whole property in the fixtures from the mortgagee to these very debenture holders is not lightly to be accepted, and certainly not in a case like this, where I am quite satisfied that in fact the whole arrangement come to was absolutely genuine, bona fide, and above board. And I doubt whether the plaintiff's case would have been put with such confidence had it not been for a view, not as it seems to me justified by the authorities, that the rights of Botsford in this fixed plant and machinery were less effective and those of the debenture holders less remote than, in fact, I think they are. It will be convenient to consider what these respective rights amount to.

Up to a point they are undoubtedly well settled. It is, to begin with, clear that a mortgage of a lease by the lessee will carry with it the fixtures of the property which is in lease when the power to remove the fixtures is in the tenant: *Meux* v. *Jacobs*. (1) It is also, as Lindley L.J. said in *Gough* v. *Wood & Co.* (2), clear " beyond all doubt " that, if such fixtures are the property of the mortgagor and are fixed upon the demised premises, although only for the purposes of his trade, they are not removable by him as against his own mortgagee, whether they are so affixed before or after the mortgage. Whatever, in other respects, be the limits of such cases as those just cited, in which it was held that in some circumstances such fixtures are removable against the mortgagee—and that there are limits, see, for example, *Ellis* v. *Glover & Hobson, Ltd.* (3) and *Reynolds* v. *Ashby & Son* (4)—these cases only apply to fixtures which do not belong to the mortgagor, and which, under contract with the true owner, are removable by him as against the mortgagor. But the ban upon the removal of his own fixtures by a mortgagor in possession as against his mortgagee does not, as contended by Mr. Topham, mean that he may not, for the convenience of his business or

(1) (1875) L. R. 7 H. L. 481.
(2) [1894] 1 Q. B. 713, 718.
(3) [1908] 1 K. B. 388.
(4) [1904] A. C. 466.

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otherwise, move them from one part of the mortgaged premises to another. Such a power does not prevent them being fixtures. See *Boyd* v. *Shorrock* (1) not overruled on this point, following *Mather* v. *Fraser* (2) approved by Lord Macnaghten in *Reynolds* v. *Ashby & Son.* (3) What the ban does mean is that he may not take them away. Their mere transfer from one part of the mortgaged premises to another would neither take them out of the security nor make the security, if unregistered, invalid as a bill of sale. So much for the position of the mortgagor.

Up to a point the position of the mortgagee is equally plain. He has no power, under such a mortgage as we have here, to sever the fixtures from the mortgaged hereditaments and sell them or otherwise deal with them separately. But the contentions of Mr. Terrell and Mr. Topham with regard to his further disabilities are by no means so clear. Properly anxious to establish that, under this mortgage, a substantial interest in the fixtures remained in the company, through which, of course, the debenture holders here claim, they contended that the assignment of the fixtures was not absolute in interest, but was only for the duration of the term, so that the right to remove them and make them its own, which during the term was always exercisable by the tenant as against the lessor, would revert at the end of the lease to the company as such tenant, and so also that no purchaser of the lease from the mortgagee could, even if he had removed the fixtures from the demised premises, retain them as against the company after the end of the lease. Failing that extreme view, it was contended that the mortgagee could never at the end of the lease remove the fixtures without the company's consent.

It is, I think, clear that, if the first view be correct, a purchaser of leaseholds from a mortgagee exercising his power of sale is, in respect of the fixtures included in his purchase, in a position of disadvantage which, I imagine, he does not suspect. And if the second view be correct, the result is that at the expiration of a lease in mortgage the mortgagor can

(1) (1867) L. R. 5 Eq. 72, 79. (2) (1856) 2 K. & J. 536.
(3) [1904] A. C. 471.

always compel the mortgagee to consent to his removing the fixtures on almost any terms he may seek to impose, seeing that, if the mortgagee does not so agree, the fixtures must inevitably revert to the landlord as his own.

But, notwithstanding certain dicta to be found in such cases as *Southport and West Lancashire Banking Co.* v. *Thompson* (1), which, divorced from their context, might appear to justify an opposite conclusion, I am of opinion that these contentions do not, any of them, correctly represent the true position. That position, I am satisfied, is that, under such a mortgage as we are here dealing with, any interest of the mortgagor in the fixtures continues so long, and so long only, as he retains some interest in the term. See *Boyd* v. *Shorrock.* (2) If he loses that interest, as a result of either foreclosure or sale by the mortgagee, his interest in the fixtures goes too. "The trade machinery simply follows the land as the shadow follows the substance"; *In re Yates.* (3) Similarly, if the mortgagor's interest in the term expires by effluxion of time, he can thereafter make no claim to the fixtures against his mortgagee, as in that event he can make none against his landlord, his right as against him to remove them during the term having passed to, and throughout remained with, the mortgagee, and never having reverted to himself. And it seems to me clear that the right of the mortgagee to remove the fixtures as against the landlord at the end of the tenancy—which right, I believe, such a mortgage as the present carries with it—cannot make the mortgage obnoxious to the Bills of Sale Acts.

This view, fortified as it is by the opinion of Wood V.-C. in *Boyd* v. *Shorrock* (2) above stated, gives, as no other can, complete effect to the presumed bargain between a mortgagor and mortgagee when a mortgage of a lease and fixtures is given, while it eliminates all facility for unconscionable pressure by impecunious mortgagors upon their unsatisfied mortgagees, against the creation of which the law must always, and even in such circumstances, set its face.

(1) 37 Ch. D. 64. (2) L. R. 5 Eq. 72, 79.

(3) 38 Ch. D. 112, 128.

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Applying that view to the present case, and remembering that in the autumn of 1917 the company was insolvent, neither it nor its debenture holders being ready or willing to redeem the mortgagee, it follows that the debenture holders had then lost every atom of tangible interest in this fixed plant and machinery. In these circumstances, unless it was the duty of the receiver, irrespective of his duty with respect to the debenture holders' own chattels, by refusing either to sell or to concur in a sale of the fixtures, to compel Botsford to delay their removal until the end of the term, I cannot doubt that his arrangement with Botsford, as it was bona fide and above board, so also was beneficial to the debenture holders. And, in my opinion, the receiver was under no such duty as I have mentioned. On the contrary, such an attitude on his part would, in my judgment, have been oppressive and unworthy, and contrary to the whole spirit of the debenture holders' original invitation to the mortgagee to make his advance to the company on a security which was to be prior to their own.

In these circumstances, has Botsford, as a solicitor, in the language of *Gibson* v. *Jeyes* (1), obtained an advantage which, with due diligence in advising the receiver, he would have prevented another from getting? The answer, in my opinion, is No. And on the whole case I would have returned the same answer had the interest of the debenture holders in these fixtures been more tangible than I believe it to be. The arrangement, in my opinion, was one in entire accord with the whole principle of the original mortgage and was beneficial to both sides.

But, even if the arrangement could not have stood, the result contended for by the plaintiff, would, in my opinion, have been so unjust as to be quite untenable; some other method of adjusting their rights must have been devised. I need not, however, further pursue this topic.

The action, in my opinion, fails, and must be dismissed with costs.

The plaintiff appealed. The appeal came on for hearing on Oct. 22, 1918.

(1) 6 Ves. 266, 270.

H. Terrell K.C. and *Topham* for the appellant.

C. J. Mathew K.C. and *Owen Thompson* for the respondent.

The arguments used in the Court below were substantially repeated. The following additional authorities were cited or referred to: *Williams* v. *Evans* (1); *Deyes* v. *Wood*. (2)

SWINFEN EADY M.R. This is an appeal from the judgment of Younger J., and it raises the question whether the plaintiffs and others in the same interest, debenture holders of the Rogerstone Brick and Stone Co., Ltd., are entitled in priority to the defendant Botsford to the proceeds of sale of certain fixtures. The learned judge dismissed the action brought to assert that claim, and the plaintiff appeals. [His Lordship stated the facts and continued:]

It is to my mind clear that the Bills of Sale Act has no reference to the point in dispute. Having regard to the language of the mortgage it is not suggested that it required registration as a bill of sale. Manifestly it did not. According to its tenor it does not confer any separate right to the fixtures. It does not constitute a separate assignment of the fixtures, and it contains no power to sever and sell them separately from the leasehold property. But the plaintiff puts his case in this way. The fixtures belonged to the company equally with the lease. The fixtures were attached to the property, and his case is that all that the company as mortgagor parted with was the interest in the premises and the fixtures for the residue of the term, and no more, and that when the term came to an end all the fixtures would revert to the mortgagor. He contended that the mortgagee could claim nothing but the use of the fixtures, and that on the fixtures being severed during the term they reverted to the mortgagor. No authority was cited in support of that proposition other than *In re Yates*. (3) In that case the point for decision was whether a particular instrument required to be registered as a bill of sale. In the Court below it was insisted that the instrument was void both as to the freehold and the fixtures.

(1) (1856) 23 Beav. 239. (2) [1911] 1 K. B. 806.
(3) 38 Ch. D. 112, 126.

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On appeal this contention was abandoned so far as regarded the freehold, and the Court held that the instrument was not a deed requiring to be registered as a bill of sale; that as the trade machinery only passed by virtue of being affixed to the freehold the mortgagee could only take possession of the machinery by taking possession of the freehold; and that the power of sale did not authorize the mortgagee to sever the fixtures and sell them apart from the freehold. That was the decision, but reliance was placed on some words at the end of the judgment of Lindley L.J.: "That shows pretty well what the understanding of conveyancers is, and it appears to me that a mortgagee of land in this form has the trade fixtures as part of his security, and under a power of sale in this form can sell the land wholly or in part, but cannot sever the fixtures and sell them separately. I am of opinion that if the mortgagee of a mill wants to have the power of selling the trade machinery apart from the mortgaged property he must have a bill of sale."

On that passage the appellants have founded an argument that if the mortgagee severs the fixtures with a view to sale then they immediately revert to the mortgagor. In my opinion this argument is not well founded. True it is that during the term the mortgagor on redeeming might have the right to remove the fixtures. But the right had to be exercised during the term, and it is clear law that during the term the mortgagor could not enter and remove the fixtures while the mortgage continued. Apart from redemption the mortgagor had parted with all his interest in the premises including the fixtures, and the mortgagee would have a power of sale, and if he sold he would sell the lease with all the rights attached thereto. It may be that if the mortgagee improperly severed the fixtures to the damage of the mortgagor the mortgagor could recover damages, but that is all. There is no ground for saying that on severance from any cause the fixtures would immediately revert to the mortgagor. If that were so see what a curious result would ensue. If the company did not carry on the works and so occasioned a forfeiture it would obviously be to the interest of the mortgagor to sever before

the landlord entered; and if the effect of this was to cause the fixtures to revert to the company, the position would be that the company as mortgagor could of its own default occasion a forfeiture of the security belonging to the mortgagee and by such default regain possession of the fixtures. In my opinion all the interest that the company had in the leasehold premises and the fixtures attached thereto was assigned to the mortgagee; apart from redemption, he had no further interest in the premises, and on the security being realized by severance and sale of the fixtures no part of the proceeds of sale belonged to the mortgagor. He had the right to redeem, but he could not claim part of the proceeds of sale. It may well be that the mortgagee could not remove the fixtures without the consent of the mortgagor, but here the debenture holders by the receiver consented to the severance; and although counsel for the mortgagee said he did not rely on this as bettering his title, still it would be difficult for the debenture holders to say it was improper when their receiver consented to it, and when it would obviously be for the benefit of all parties that the fixtures should be severed.

For these reasons I am of opinion that the learned judge was right in saying that the plaintiff had not established a case against the defendant.

DUKE L.J. Having regard to the form in which the action was brought and the grounds on which it was conducted below it is clear to demonstration that the judgment was rightly entered for the defendants, and counsel for the plaintiff has conceded that the utmost relief for which he could ask was in respect of an aliquot part of the proceeds of sale bearing the same proportion to the balance of these proceeds of sale as the interest of the mortgagor bore to the interest of the mortgagee. The real question contested here, therefore, is whether there was some unascertained part of the proceeds of sale which ought in equity to be paid to the debenture holders. Counsel for the debenture holders founded his claim on the proposition that what passed to the mortgagee by the mortgage was not the interest that the lessee of the premises had in the fixtures,

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Duke L.J.

but something less than that. It was described as a right of user of the fixtures during the term. What the position would have been if the mortgage had been effected by way of subdemise is not material here, but it is clear that it might have been different. Here the mortgage was by assignment of the term including the fixtures. The position of such a mortgagee was stated by Lord Hatherley in *Meux* v. *Jacobs*. (1) Without saying anything about an underlease, he says that "a mortgage or assignment out and out of all a leaseholder's interest in the property itself, as distinguished from the fixtures, carries with it also the interest in the fixtures attached to the property"; and he goes on to say that it would extend to fixtures subsequently attached to the premises. He says: "The mortgage would attach to them"; and the mortgagee would, at any time during the lease, have the benefit which his mortgagor had of removing those chattels that had been attached to the premises anterior to his mortgage, and also those that were subsequently attached thereto posterior to his mortgage.

What is said here is that as between the two mortgagees the equitable interest of the common mortgagor entitles the second mortgagee to defeat the title of the first mortgagee to the chattels. No authority has been cited for that proposition, which is a sufficiently startling one. It is founded on cases containing statements of what assignments of chattels and fixtures require registration as bills of sale, but I think these cases are irrelevant for the present purpose. I agree with the Master of the Rolls in thinking that they have no bearing on the present question. When you find that a sale has been effected by the mortgagee in possession with the concurrence of the mortgagee out of possession, and that the mortgagee out of possession cannot therefore dispute the validity of the sale, the only question that remains is whether the second mortgagee by whom the sale was not made has obtained the right to a share of the proceeds of the sale. The proposition that the debenture holders have a right to a share of the proceeds of sale is founded, first, on cases

(1) L. R. 7 H. L. 481, 491.

under the Bills of Sale Act and then on the particular circumstances of the case. It happened that the mortgagee was a solicitor, and that he advised the receiver for the debenture holders, and therefore it is said that the mortgagee must be taken to have forfeited any right dependent on the consent of the receiver. I was struck for some time with the proposition that if there could be no sale of the fixtures apart from the leasehold premises without the debenture holder's consent the right to some benefit could be founded on the need for that consent. But I am satisfied that this was not a consent for which any consideration ought to have been exacted. I concur entirely with the judgment of the Master of the Rolls, and I have only added these observations because of the extreme nature of the claim that has been made by the debenture holders as second mortgagees.

EVE J. The discussion has extended over a wide area, but the only material point of time is the date immediately antecedent to the removal of the fixtures. At that moment of time the only right of the mortgagor was to redeem and receive back the leasehold property and fixtures. Subject to that right both the leasehold premises and the fixtures were vested in the mortgagee, but he was precluded from severing the fixtures and selling them separately. The argument on behalf of the appellant is that on the mortgagee severing the fixtures the property in them became revested in the mortgagor company or those claiming under it. No authority for such a proposition has been produced, and in my opinion the proposition is quite unsound. It may be that the mortgagor company could have recovered any damages caused by the severance, but between that remedy and the rights which the plaintiffs contend enured to the mortgagor there is a very obvious and material difference. The unsoundness of the plaintiffs' argument is demonstrated when it is pressed to its logical conclusion, for counsel for the plaintiffs was bound to admit that if there had been a sale of the leasehold property and the fixtures to a purchaser in exercise of the mortgagee's power of sale, and the purchaser had severed the fixtures, the

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mortgagor would have been entitled to recover them. Such a contention is obviously absurd. I am of opinion, therefore, that the appeal should be dismissed.

Solicitor for the appellant: *Theodore Roberts.*

Solicitors for the respondent: *Bell, Brodrick & Gray.*

G. A. S.

ASTBURY J. 1918 Nov. 19.

In re PHILLIPS.

In re HOWARD.

CHARTER v. FERGUSON.

[1918 P. 537.]

Marriage—Deceased Wife's Niece—Validity—Deceased Wife's Sister's Marriage Act, 1907 (7 *Edw.* 7, *c.* 47).

The Deceased Wife's Sister's Marriage Act, 1907, does not by implication enable a man to marry his deceased wife's niece.

ORIGINATING SUMMONS.

In 1873 J. H. E. Charter married the testatrix, Gertrude Anne Howard (formerly Harwood), the daughter of his deceased wife's illegitimate brother.

There were four children of this marriage—viz., a son, who died intestate and without issue in 1913, another son—viz., the plaintiff—and two daughters, who were defendants.

On December 26, 1893, J. H. E. Charter died, and on November 28, 1894, the testatrix married F. J. Howard. There was no issue of this marriage, which was dissolved on January 22, 1900.

The testatrix died on October 19, 1917, having, by her will of October 21, 1896, and a codicil of July 26, 1901, disposed of her residuary real and personal estate, including property disposable by her by virtue of a general testamentary power under the will of the above-named James Phillips.

On December 17, 1917, administration cum testamento annexo was granted to the testatrix's son, the plaintiff, her executors having predeceased her.

Owing to the lapse of some of the dispositions under her will it became necessary to ascertain the testatrix's heir at law and statutory next of kin, and the question at once arose whether her marriage to J. H. E. Charter was valid and her children legitimate.

On April 29, 1918, the plaintiff issued this summons to determine this and other points.

Micklem K.C. and *T. T. Method* for the plaintiff.

Henry Terrell K.C., *Sheldon* and *Dighton Pollock* for the two daughters. We cannot contend that the illegitimacy of the testatrix's father is material as regards affinity.

The real question is whether a marriage to a deceased wife's niece was within the prohibited degrees.

It was undoubtedly within the prohibited degrees set forth in Archbishop Parker's Table of Affinity, 1563, item 29, Wife's Brother's Daughter, and item 30, Wife's Sister's Daughter, and made part of the Canon Law by Canon 99 of 1603.

But this law did not bind the laity proprio vigore, and the marriage was not expressly mentioned in the statutory prohibited degrees enumerated in the Marriage Act, 1533 (25 Hen. 8, c. 22), s. 3.

Marriage with an aunt or an uncle's wife was, however, expressly prohibited, and the Ecclesiastical Courts held that marriage with a wife's niece was prohibited by parity of reason: *Wortley* v. *Watkinson* (1); *Ellerton* v. *Gastrell* (2); and consequently voidable by sentence of nullity during the lives of the spouses.

Marriages within the prohibited degrees were subsequently rendered null and void by the Marriage Act, 1835 (5 & 6 Will. 4, c. 54), and in *Reg.* v. *Brighton Inhabitants* (3) the Court of Queen's Bench adopted the above decisions, and held that a marriage to a wife's sister's daughter was void.

[ASTBURY J. They did more than that. They held that the previous ecclesiastical law had received statutory recognition by the Marriage Act, 1835.]

(1) (1679) 2 Lev. 254. (2) (1719) 1 Com. 318.
(3) (1861) 1 B. & S. 447, 458.

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That is so; and on the law prior to 1907 we can only question the decision in a higher Court.

But the law has, in fact, been altered retrospectively by the Deceased Wife's Sister's Marriage Act, 1907, s. 1, which provides that "no marriage heretofore or hereafter contracted between a man and his deceased wife's sister . . . . shall be deemed to have been or shall be void or voidable, as a civil contract, by reason only of such affinity." A deceased wife's sister is therefore removed from the prohibited degrees, and a fortiori her sister's daughter, who is one degree further off, is removed by implication. It cannot have been intended to make a wife's sister marriageable and leave her daughter unmarriageable.

By parity of reason a wife's brother's daughter, being in the same degree as her sister's daughter, is now marriageable.

Cunliffe K.C. and *J. G. Wood* for the testatrix's brother, who claimed to be her heir at law and one of her statutory next of kin. *Reg.* v. *Brighton Inhabitants* (1) is still law. The Deceased Wife's Sister's Marriage Act, 1907, has a very limited application. It does not interfere with the prohibited degrees generally. It merely makes one special exception. With that exception the prohibited degrees stand: Halsbury's Laws of England, vol. 16, p. 284n.

Jenkins K.C., *J. M. Gover*, and *G. H. Devonshire* for other parties.

ASTBURY J. (after stating the facts). I have heard an interesting argument on prohibited degrees dealing with the Marriage Act, 1533, the Marriage Act, 1835, and two old ecclesiastical authorities in Levinz and Comyns, but I do not propose to travel through this early matter.

In *Reg.* v. *Brighton Inhabitants* (1), it was held that—

1. The marriage of a man with his deceased wife's half-sister's daughter is null and void by the Marriage Act, 1835; and

2. A marriage within the prohibited degrees of consanguinity or affinity is null and void, although one of the parties is illegitimate.

(1) 1 B. & S. 447, 458.

Cockburn C.J. said: "It is a case . . . . which depends upon the question, whether a marriage with the niece of a deceased wife is or is not valid; and I now state, as the united opinion of the Court, that such a marriage is not lawful. In *Ellerton* v. *Gastrell* (1) . . . . the Court was of opinion that a marriage with the daughter of a wife's sister was within the degrees prohibited by the Levitical law. Then we have [the Marriage Act, 1835] which, by s. 2, enacts 'that all marriages which shall hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity shall be' not merely voidable, but 'absolutely null and void to all intents and purposes whatsoever.' We must consider that Act . . . . to have been passed with reference to the known and ascertained state of the law in the Ecclesiastical Courts, and as laid down by the Court in *Ellerton* v. *Gastrell* (1), and consequently we have that law sanctioned and confirmed by an Act of Parliament."

It was contended that since the passing of the Deceased Wife's Sister's Marriage Act, 1907, *Reg.* v. *Brighton Inhabitants* (2) was no longer applicable, because as a past or future marriage with a deceased wife's sister was validated, a fortiori a marriage with a deceased wife's sister's daughter who is one degree further off was validated.

I cannot accede to that argument.

The 1907 Act did not alter the prohibited degrees generally. It merely removed one of them. In the present case the marriage was not by a widower with his deceased wife's sister's daughter but with her brother's daughter. I am unable to find anything in the 1907 Act to validate such a marriage, and I therefore hold it was void.

Solicitors: *R. S. Taylor, Son & Humbert; Swepstone, Stone, Barber & Ellis; Milles, Jennings White & Foster; White & Leonard for Hartley & Son, Rochdale; J. D. Arthur for Goody, Sons & Weatherall, Colchester; Devonshire, Monkland & Co.*

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(1) 1 Com. 318.

(2) 1 B. & S. 447.

ASTBURY J.

1918

Dec. 3.

In re GARSIDE.

WRAGG v. GARSIDE.

[1918 G. 660.]

Accumulations—Will—Income of Specific Property—Trust for Sale—Discretionary Trust for Son's Maintenance—No Disposition of Unapplied Income—General Residuary Bequest—Residue Settled—Accumulations Act, 1800 (*Thellusson Act*) (39 & 40 *Geo.* 3, *c.* 98).

An implied trust to accumulate the surplus income of freeholds specifically devised on trust for sale exceeded 21 years from the testator's death. The accumulations and surplus income being otherwise undisposed of were caught by a general residuary bequest with a trust to invest for a life tenant and remaindermen.

Held, that the valid accumulations during the 21 years from the testator's death fell into the residue as capital, but the accumulations after that date were invalid and went to the life tenant as income.

In re Hawkins [1916] 2 Ch. 570 followed.

In re Pope [1901] 1 Ch. 64 not followed.

ORIGINATING SUMMONS.

By his will dated May 15, 1893, a testator specifically devised certain real estate at Worksop and a house at Bridlington Quay to his wife for life, in confidence that she would during her life maintain his eldest son Abraham, but this expression of confidence was not to imply any trust in Abraham's favour. After his wife's death the testator devised the Worksop estate to his trustees upon trust for sale, with full power of postponement and interim management, and upon trust to apply the net income, or a competent part thereof, for Abraham's maintenance, support and benefit in such manner as they should in their uncontrolled discretion think fit, and upon Abraham's death to the use that his widow should receive a rentcharge of 500*l.* a year for life out of the Worksop estate and proceeds of sale and subject to that rentcharge to the use of all of Abraham's children who should attain 21 as tenants in common. But if no child attained 21 the testator devised the Worksop estate and proceeds of sale subject to the rentcharge to the uses of his residuary real estate.

The testator then devised and bequeathed his residuary real and leasehold estates and his residuary personal estate to his trustees upon trust in the first place to pay his funeral and testamentary expenses, debts and legacies out of his personal estate, and in the next place to pay certain annuities out of the income of his residuary real and personal estate to certain children and grandchildren (not including Abraham) until his youngest child for the time being attained 21, and to accumulate the surplus income, by way of investment at compound interest, and hold the accumulations as part of his residuary personal estate. As soon as his youngest child for the time being attained 21 he devised his residuary real and leasehold estates to the use of his son Frederick Garside for life, without impeachment of waste, and upon his death to the trustees to the use of Frederick's children who should attain 21 as tenants in common, and in default of such children upon trust for sale, and to hold the proceeds upon the ultimate trusts of his residuary personal estate.

The testator bequeathed his residuary personal estate, including all accumulations thereof, to his trustees upon trust for sale and conversion, and out of the proceeds to set apart and invest certain capital sums in settlement on his daughters and their children, and subject thereto to invest the residue of the personal estate and pay the income to Frederick Garside for life, and after his death to hold the capital and future income in trust for his children who should attain 21 or marry, with an ultimate trust in default of such children for the testator's daughters on the trusts of the settled capital sums.

The testator declared that if Abraham assigned, or attempted to assign, the income applicable for his benefit, or did, or permitted, any act or default inconsistent with his personal enjoyment of the trust for his benefit, the trustees should thenceforth hold the income upon trust to apply the same for the maintenance and support or otherwise for the benefit of Abraham and his wife and issue (if any), and if he had no wife or issue, then for the benefit of such one or more of Abraham and his brothers, sisters, nephews, and nieces in

ASTBURY J. 1918 GARSIDE, *In re.* WRAGG *v.* GARSIDE.

such manner as the trustees in their discretion thought fit.

The testator authorized the trustees to postpone the sale and conversion of his real and leasehold estates whilst subject to any trust for sale for so long as they should think fit, and directed that the rents, profits, and income of property remaining unsold should be applied in the manner in which the proceeds of sale would be applicable.

The testator died on July 16, 1893.

His youngest child attained 21 on July 28, 1896.

His wife died on December 26, 1899.

Abraham died on January 12, 1918, a bachelor and intestate.

The daughters' capital sums were set apart out of the residuary personal estate.

After the wife's death the trustees applied so much of the Worksop income as was required for Abraham's maintenance, support and benefit, and accumulated the balance, with the result that at his death they held 12,000*l.* accumulations of unapplied income, of which they desired to ascertain the ownership.

On June 11, 1918, the trustees issued this summons to determine—

(1.) Whether the 12,000*l.* (*a*) passed under the residuary devise or bequest, or (*b*) belonged to Abraham's estate, (*α*) under the will, or (*β*) as the testator's heir at law.

(2.) If it passed under the residuary devise or bequest, whether it was residuary capital or passed to the life tenant as income.

Percy Wheeler for the trustees.

E. E. H. Brydges for a person representing Abraham's estate.

First. The trust for Abraham's maintenance, coupled with the proviso against alienation, virtually amounted to a gift of the whole income to him. He could not alienate a mere right of personal support, nor would it pass to his trustee in bankruptcy.

Secondly. The surplus rents, if not impliedly given to Abraham, were undisposed of, as there is nothing in the

gift over, on his death, to carry them to his wife and children, or into residue. They therefore passed to him as heir at law, the trust for sale having failed pro tanto: *Eyre* v. *Marsden.* (1)

Thirdly. If the will implies a direction to accumulate, so that the Thellusson Act applies, the result is the same. The accumulations, both before and after the 21 years from the testator's death, being undisposed of, resulted to Abraham as heir at law.

Fourthly. If, on the other hand, the accumulations were caught by the residuary devise, the valid accumulations passed as capital. But the surplus rents after the 21 years became income of the residuary estate, subject to a direction to accumulate that residuary income during Abraham's life. That direction being invalid, this residuary income was undisposed of, and resulted to Abraham as heir at law.

Owen Thompson for the life tenant of the residuary estate. The undisposed of rents, whether realty or personalty, were annually caught by the residuary devise or bequest, and were income of residue. Like a conditional annuity, they were residuary income unless, and until, wanted. There was no express or implied direction for the accumulation, which was entirely voluntary and unnecessary. The Thellusson Act is therefore inapplicable.

If, however, on the construction of the will there was an implied direction to accumulate, the accumulations during the first 21 years from the testator's death only are capital. The rest are income, the direction after that date ceasing to operate.

In re Phillips (2); *In re Hawkins.* (3)

Dighton Pollock for an infant remainderman. The specific property being devised on trust for sale, which is still operative, each item of surplus income was personalty caught by the residuary bequest, and liable to be invested as capital. There was virtually an estate pur autre vie in the surplus income which, like any other wasting security, the trustees were

(1) (1838) 2 Keen, 564, 574. (2) (1880) 49 L. J. (Ch.) 198.
(3) [1916] 2 Ch. 570.

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bound to realize and invest as capital either as a whole or item by item as they received it. Unlike a contingent legacy or annuity, which until wanted remained residue, no part of this specific property ever became residue till the trusts partially failed.

This is quite apart from any direction to accumulate. In the present case, however, the trustees clearly could not part with any of the income applicable for Abraham's benefit, so that there was an implied trust for accumulation during his life. That is quite sufficient to attract the Thellusson Act : *M'Donald* v. *Bryce* (1) ; *Tench* v. *Cheese.* (2)

The valid accumulations during the first 21 years were clearly capital, and being undisposed of, fell into residue as such. After the 21 years the direction to accumulate ceased to operate, and the surplus income fell into residue as capital : *Crawley* v. *Crawley* (3), *O'Neill* v. *Lucas* (4), *In re Pope.* (5)

ASTBURY J. (after stating the facts). With regard to the first question it is clear that there is no direct gift of the income of this specific real estate to Abraham at all. There is a trust under which the trustees are entitled to apply the income or a competent part thereof as they in their uncontrolled discretion shall think fit for his benefit. They have exercised that trust and a sum of 12,000*l.* income derived from this property has accumulated in their hands. That money, subject to what I shall say in a moment, passes, in my judgment, under the residuary bequest.

A much more difficult question is as to the character in which it passes. The period during which this money was accumulated exceeded 21 years from the testator's death. Under the trusts of this will, if the trustees exercised their discretion as they did, it is obvious that there was an accumulating sum of income from time to time unapplied for Abraham's benefit, and on the authorities the accumulation so growing up can only be held and invested as such for a

(1) (1838) 2 Keen, 276.
(2) (1855) 6 D. M. & G. 453.
(3) (1835) 7 Sim. 427.
(4) (1838) 2 Keen, 313.
(5) [1901] 1 Ch. 64.

period of 21 years under the Thellusson Act. This sum of 12,000*l.* must therefore be divided into two portions, one that grew up between the testator's death and the expiration of the 21 years, and the other that has since accrued.

The first sum, namely, the valid accumulation, forms part of the capital of the testator's residuary estate. It consists of sums validly and properly accumulated during Abraham's life. During his life these sums were liable to be drawn upon for his benefit under the trusts in his favour, but the balance existing at his death formed part of the testator's general residuary personal estate. There is a trust for sale of this specific property which I think, on the whole, never ceased to be operative, and therefore there is a validly accumulated sum of personal estate which passed on Abraham's death as capital of the testator's residue, and I so decide.

With regard to the surplus income accrued between the expiration of the 21 years and the death of Abraham, the case is different. This matter has been the subject of many conflicting decisions, but I propose to follow the views of Sargant J. in *In re Hawkins* (1) upon this point. He there held, following *In re Phillips* (2) and *In re Cababé* (3) in preference to *Crawley* v. *Crawley* (4), *O'Neill* v. *Lucas* (5) and *In re Pope* (6), that surplus income of this character after the expiration of the 21 years could not be added from time to time to the capital of residue and dealt with accordingly without infringing the Thellusson Act, and therefore it was distributable as income of the residuary estate.

Declaration accordingly.

Solicitors: *King, Wigg & Brightman, for Broomhead, Wightman & Moore, Sheffield.*

G. R. A.

(1) [1916] 2 Ch. 570.
(2) 49 L. J. (Ch.) 198.
(3) [1914] Current Digest 2; 59 Sol. J. 129.
(4) 7 Sim. 427.
(5) 2 Keen, 313.
(6) [1901] 1 Ch. 64.

YOUNGER J.

1918

Nov. 8, 15.

POWELL *v* HELLICAR.

[1858 P. 118.]

Will—Construction—"Survivors or Survivor."

Testatrix, who died in 1858, gave her residuary estate to trustees upon trust for her nephew A. and her two nieces B. and C. for their respective lives only and after their respective deceases then in trust for their respective children who should attain 21 or die under that age leaving issue such last-mentioned child or children taking per stirpes and not per capita, and in case any or either of her said nephew and nieces should die without leaving a child or children then the share of each of them so dying "shall from time to time go to the survivors or survivor of them and the child or children of such survivors or survivor in like manner as hereinbefore provided in regard to his, her or their original share or shares" and subject to the trusts thereinbefore declared the testatrix gave her said residuary estate unto E. H., who died in her lifetime. A. died in 1882 without issue. B. died in 1900, having had three children who attained 21. C. died in 1917, a spinster. On a petition by the three children of B. for payment out of a fund in court representing C.'s original third share, and the one-sixth share accrued thereto on the death of A.:—

Held, that on the true construction of the will the petitioners were entitled to the fund.

The absence of a gift over of the entire fund on the failure of issue of all the tenants for life is not of itself conclusive to show that the words "survivors or survivor" are to be read in their strictly literal sense.

The authorities considered.

PETITION.

Elizabeth Fuidge, who died in 1858, by her will, dated June 24, 1856, after making certain specific legacies in favour of her nephew, Charles Turner Powell, and her nieces, Catherine Elizabeth Powell and Mary Ann Powell, gave her residuary estate to trustees upon trust "for my said nephew and nieces, the three surviving children of my late sister, Catherine Powell, if and when they respectively shall attain the age of 21 years for their respective lives only, and from and after their respective deceases whether under the age of 21 years or after attainment to that age then in trust for their respective children, if any, who shall attain the age of 21 years or die under that age leaving lawful issue, such last mentioned child or children

taking per stirpes and not per capita, and in case any or either of the children of my said sister shall die without leaving a child or children then the share of each such child so dying of my said sister shall from time to time go to the survivors or survivor of them and the child or children of such survivors or survivor in like manner as hereinbefore provided in regard to his, her or their original share or shares . . . and subject to the trusts hereinbefore declared I give my said residuary estate and the stocks, funds and securities in or upon which the same may be invested unto " Esther Hassell, her executors, administrators and assigns for her and their own absolute use and benefit.

Charles Turner Powell died in 1882 without issue. Mary Ann Powell (afterwards Mrs. Page) died in 1900, having had five children, three of whom attained 21. Catherine Elizabeth Powell died on November 20, 1917, a spinster. Esther Hassell died in the lifetime of the testatrix.

This petition was presented by the three children of Mary Ann Page for payment out of Court of a fund consisting of two sums of 1,210*l.* 11*s.* 4*d.* and 1,907*l.* 18*s.* 7*d.* new Consols, now representing the original settled third share of Catherine Elizabeth Powell and the one-sixth share which accrued thereto by the death of Charles Turner Powell in 1882. The funds representing the other shares in the residuary estate were paid to the petitioners on the death of their mother in 1900.

E. Beaumont for the petitioners. The petitioners are entitled to the fund notwithstanding the fact that their mother died in the lifetime of Catherine Elizabeth Powell. To attribute their literal meaning to the words " survivors or survivor " in this will would completely defeat the intention of the testatrix. The words must be read as meaning the others or other of the life tenants during the period of their, his or her survivorship with remainder to the children. It is contended against me that such a construction can only be adopted where there is a complete gift over of the entire fund on the death of all the tenants for life without issue. But in the present case the residuary gift to Esther Hassell " subject to the trusts

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hereinbefore declared" amounts to a sufficient gift over for this purpose, and the accident of her death in the testatrix's lifetime cannot affect the construction of the will. I rely on *Waite* v. *Littlewood* (1); and though in that case there was a general gift over on the failure of issue of all the tenants for life that circumstance was not the ground of Lord Selborne's decision. The importance to be attached to such a gift over is considered in a long line of later authorities: *Wake* v. *Varah* (2); *Lucena* v. *Lucena* (3); *In re Walker's Estate* (4); *In re Horner's Estate* (5) (in which case Hall V.-C. departed from his previous decision in *In re Walker's Estate* (4)); *In re Benn* (6); *In re Bowman* (7) (in which case the third rule stated by Kay J. has since been dissented from); *Harrison* v. *Harrison* (8); *Inderwick* v. *Tatchell* (9); *O'Brien* v. *O'Brien* (10); *In re Bilham* (11); *In re Friend's Settlement* (12) (where Farwell J. distinguished *In re Bilham* (11)); and see Jarman on Wills, 6th ed., p. 2109; and there is no authority which goes the length of saying that in the absence of such a gift over the Court is forced to construe the words of the will in their strictly literal meaning contrary to the intention of the testatrix to be gathered from the whole will.

Mathew K.C. and *J. R. Brooke* for the next of kin. The case is undistinguishable from the later authorities, which decide that in the absence of a general gift over on the death of all the tenants for life without issue there is no sufficient ground for reading the words "survivors or survivor" in any other than their natural sense. The form of the residuary gift to Esther Hassell does not amount to such a general gift over, and affords no ground for the inference that the words are used in their non-natural sense: *Inderwick* v. *Tatchell* (9); *In re Robson* (13); Hawkins on Wills, 2nd ed., p. 249; Jarman on Wills, 6th ed., pp. 2101, 2109.

(1) (1872) L. R. 8 Ch. 70.
(2) (1876) 2 Ch. D. 348.
(3) (1877) 7 Ch. D. 255.
(4) (1879) 12 Ch. D. 205.
(5) (1881) 19 Ch. D. 186.
(6) (1885) 29 Ch. D. 839.
(7) (1889) 41 Ch. D. 525, 532.
(8) [1901] 2 Ch. 136.
(9) [1901] 2 Ch. 738; [1903] A. C. 120.
(10) [1896] 2 I. R. 459.
(11) [1901] 2 Ch. 169.
(12) [1906] 1 Ch. 47.
(13) [1899] W. N. 260.

D. D. Robertson for other next of kin. The settlement of an accruing share on the same trusts as an original share is not a sufficient reason for departing from the literal meaning of the word "survivor": *Harrison* v. *Harrison* (1); *Inderwick* v. *Tatchell* (2); dissenting from the third rule formulated by Kay J. in *In re Bowman* (3)—viz., that the children of a predeceased tenant for life "also participate, although there is no general gift over, where the limitations are to A., B. and C. equally for their respective lives, and after the death of to any of his children, and if any die without children to the surviving tenants for life and their respective children, in the same manner as their original shares."

In dissenting from that rule Cozens-Hardy J. in *Harrison* v. *Harrison* (1), and the Court of Appeal in *Inderwick* v. *Tatchell* (2), whose decision was affirmed in the House of Lords, decided in effect that the wider construction ought not to be adopted in the absence of a general gift over on the failure of issue of all the tenants for life. There was such a general gift over in *Waite* v. *Littlewood* (4), which can be supported on that ground, otherwise the decision is inconsistent with *Inderwick* v. *Tatchell*. (2)

[He also referred to *Garland* v. *Smyth* (5); *King* v. *Frost*. (6)]

G. T. Simonds for the trustee.

E. Beaumont in reply.

Cur. adv. vult.

Nov. 15. YOUNGER J. delivered the following written judgment, in which, after stating the facts and reading the terms of the testatrix's will, he continued: The fund to which the petition relates is that interest in residue to which under the will of the testatrix her niece, Catherine Elizabeth Powell, was entitled for her life, including, of course, the moiety of her brother Charles Turner Powell's interest which, on his

(1) [1901] 2 Ch. 136.
(2) [1901] 2 Ch. 738; [1903] A. C. 120.
(3) 41 Ch. D. 525, 532.
(4) L. R. 8 Ch. 70.
(5) [1904] 1 I. R. 35.
(6) (1890) 15 App. Cas. 548.

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death in 1882, accrued to the original third share of Catherine Elizabeth Powell. The question is whether that entire fund devolves now upon the petitioners, the three children of Mary Ann Page, or whether, in the events which have happened, it is undisposed of by the will and devolves upon the next of kin of the testatrix. That again, apart from one possible view of the will, turns upon the old question whether in this will the words "survivors or survivor" must necessarily be read with reference to the person on whose death the share is to go over or whether they may be read in some qualified sense as "others or other."

The ultimate residuary legatee, Mrs. Hassell, died in the lifetime of the testatrix; and it will be noted that the fund undisposed of by the will, if any there be, is in that state only by reason of that accident. Such an accident cannot alter that which would have been the true construction of the gift in question had it not happened, and that construction must, I agree, be determined as if the question were one between the petitioners as the children of the testatrix's niece on the one hand and her ultimate residuary legatee as distinguished from her next of kin on the other.

Now it will be observed, first of all, that the clause with which we have here to deal is in more respects than one inaccurately and awkwardly expressed. The gift to the children of a nephew or niece's child who dies under 21 is only elliptically conferred although possibly with sufficient clearness. More important now is it to observe that the gift over "in case any or either of the children of my said sister shall die without leaving a child or children," while inappropriate to the original gift in many respects, can only be brought into some kind of consonance with it by reading the word "leaving" as equivalent to "having or having had a child," for nothing is clearer on the clause than this, that both a child and a grandchild of any of the three tenants for life may participate in an original share of such tenant for life whether the child or grandchild survives the tenant for life or not. In other words, the testatrix in this clause uses one plain English word, "leaving," in a non-natural sense. The question is whether in the

same clause she has not used another word of similar import, "survivor," in an extended sense also.

Now, reading the will in order to determine this, it is, I think, quite clear, as I have already said, that a child takes at 21 a vested interest in the fund whether he or she survives the tenant for life or not; that a grandchild, provided his or her own parent dies under 21, equally takes a vested interest even if he or she predeceases the tenant for life. In other words, the survivorship of the tenant for life has no influence at all upon the vesting of the interest either of a child or a grandchild in that tenant for life's original third. If, however, the words "survivors or survivor" are in this will to be read strictly, the interest taken by such a child or grandchild in what may be called an accrued share will depend entirely upon the future unascertainable and apparently irrelevant event, whether the tenant for life to whom they succeed dies it may be one minute after or dies one minute before the tenant for life whose share on death goes over, or putting the point as it was put by Baggallay J.A. in *Wake* v. *Varah* (1): "Issue of a deceased child to participate in any benefit from an accrued share is made to depend upon the accident of their parent surviving the brother or sister whose share is given over; a provision of a most capricious character, and entirely inconsistent with the intention of the testator, as indicated by the original gift."

It must, however, be agreed that this consideration standing alone would not normally justify a Court of construction in straining a testator's language to avoid its consequences. But it is a consideration of importance, and it may gain an added force in conjunction with other considerations to be found in a particular will pointing in the same direction. Are there any in this will pointing to the conclusion that the words "survivors or survivor" are not in it used in their strictly literal sense? I find at least two. The first is in the words of the gift over, that "the share of each child so dying . . . shall from time to time go to the survivors or survivor," etc. The testatrix

(1) 2 Ch. D. 348, 354.

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clearly means the clause to be possibly operative on the death of every one without issue, and in these circumstances the observations of the Lord Chancellor in the case of *Smith* v. *Osborne* (1) are in point: "Unless the word 'surviving' is to be taken here to mean 'other,' the intention cannot be carried into effect, for he means his gift over to come into operation if either of his daughters dies without issue, that is, on the death of the daughter who dies first, or of the daughter who dies last, and the latter object cannot be accomplished unless the word 'surviving' shall be so read as to be rendered capable of being applied to the predeceasing daughter"; and as Kay J. points out in *In re Bowman* (2) this reasoning is independent of any argument derived from the ultimate gift. It is true that in *Smith* v. *Osborne* (3) there were only two original takers while here there are three. But this distinction, if distinction it be, is, I think, largely neutralized by the emphatic words of the present clause "from time to time." See, too, on this point *Wake* v. *Varah*. (4)

And the second consideration which I find is this. The share is to go over "to the survivors or survivor of them and the child or children of such survivor in like manner as hereinbefore provided in regard to his, her or their original share or shares." In my judgment these referential words greatly accentuate, as applied to this will, the force of the observations of Baggallay J. A. in *Wake* v. *Varah* (4), already quoted. Similar words, although more precise, I agree, in terms, were treated by Farwell J. in *In re Friend's Settlement* (5) as themselves sufficient, and his reasoning is most cogent, although his judgment is one of the many instances of conflict in judicial opinion which is to be found on this subject, being apparently at variance on this point with that of Cozens-Hardy J. in *Harrison* v. *Harrison* (6), and possibly with that of Lord Davey in *Inderwick* v. *Tatchell*. (7)

But, further, in the present case, in order to reach the result that the petitioners are entitled to the fund, it is not

(1) (1857) 6 H. L. C. 375, 393.
(2) 41 Ch. D. 525, 531.
(3) 6 H. L. C. 375.
(4) 2 Ch. D. 348, 354.
(5) [1906] 1 Ch. 47.
(6) [1901] 2 Ch. 136.
(7) [1903] A. C. 120.

in my judgment, necessary to attribute to the words "survivors or survivor" the meaning *sans phrase* of "others or other." The Courts are reluctant to go so far (see *King* v. *Frost* (1)), although with the assistance of an ultimate gift over they have frequently done so. In this case, however, it is not essential. The nephew and the two nieces here were tenants for life only; and with reference particularly to such an interest the word "survivor," as was said by Lord Selborne L.C. in *Waite* v. *Littlewood* (2), often is "an imperfect expression, not expressing completely and exhaustively the whole intention," which in the present case would be expressed if the words "survivors or survivor" were held to mean "others or other" during the period of their, his or her survivorship. Such an interpretation meets every difficulty; it manifests no more than "that just disposition of the Court in doubtful cases to lean to that construction which made a complete provision for all those children or descendants who were manifestly the objects of the testator's bounty" (*Waite* v. *Littlewood* (2)); and it requires in an inartificial will like the present only the slightest extension beyond the normal of this "imperfect expression."

But the same result, so far as the claim of the petitioners is concerned, may, I think, on this will be reached in another way. The nephew and two nieces here being tenants for life only, actual survivorship was essential to their personal enjoyment of anything. Bearing this circumstance in mind, it is, I think, a fair reading of the gift in this will that the contingency of survivorship is applied only to them. It is as if the gift over were to the remaining child or children for life if they, he or she survived, and afterwards to their, his or her children; and it will be noticed in this connection that the words "in like manner as hereinbefore provided in regard to his, her or their original share or shares," grammatically by the arrangement of the possessive pronouns, refer to the interests of the *child or children* and not to those of the *survivors or survivor*, so emphasizing the view that there was in the mind of the

(1) 15 App. Cas. 548. (2) L. R. 8 Ch. 70, 74.

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testatrix to be no difference in the conditions under which the child could claim an original and those under which an accrued share could be claimed. I find strong support for this view in the judgment of Cleasby B. in *Wake* v. *Varah*. (1)

On all these grounds on the construction of this particular will I am clearly of opinion that this fund goes over to the petitioners, notwithstanding the fact that their mother predeceased Catherine Elizabeth Powell.

This, in my judgment, applying to this will the language of James L.J. in *Wake* v. *Varah* (2), is one of those cases in which "no plain man, not a lawyer, would have had the slightest doubt . . . that the real intention of the testator was effectuated thereby."

But it is said that the authorities preclude me from giving effect to this view. They show, so it is contended, that the non-natural interpretation of the words "survivors or survivor" is, apart from what I may for brevity call Baron Cleasby's point (1), only permissible when it is assisted by a gift over of the entire fund on the failure of issue of all the tenants for life or possibly where it is rendered necessary to avoid an intestacy. It is true that we have in this case a kind of gift over, but I agree that its form fails to make it of effect. We have also a kind of intestacy, but, as I have said, that is under this will an accident powerless to influence construction. This will must therefore be treated as one in which neither of these elements is present.

Now, I have read all the cases cited to me and many more. It passes the wit of man, as Cozens-Hardy J. said in *Harrison* v. *Harrison* (3), to reconcile them all; and true it is that the effect of such a gift over, in many of the cases, especially in what I may call the middle period, is all potent. It was not always so. It may be doubted, for instance, whether in *Waite* v. *Littlewood* (4) Lord Selborne, any more than his learned reporter, attached any real importance to the gift over. The suggestions in some later cases that his judgment turned upon it are not to my mind convincing.

(1) 2 Ch. D. 348, 359.
(2) 2 Ch. D. 358.
(3) [1901] 2 Ch. 136, 141.
(4) L. R. 8 Ch. 70.

Indeed, there is a fashion in these things, and the vogue of the gift over is comparatively modern. It has served as a useful corrective to the excesses of literal interpretation, and its judicial popularity, possibly for that reason, has been great. In truth, it is not too much to say that in some cases it has led the Court beyond what one might regard as the limits of permissible interpretation for the purpose only of avoiding an intestacy which, as Fry L.J. said in *In re Benn* (1), "is not enough to induce the Court to give an unnatural meaning to a word." One would never suppose in some of the cases that the result could be reached without a gift over; one rather feels surprised that it was reached at all.

I have not, however, found a single case at any stage of the progress of the gift over—it would be tedious to examine them all here—in which it is either said or suggested that, if on the will itself you arrive at the conclusion which in this case I have reached as to the true import of the words "survivors or survivor," you may not give effect to that conclusion merely because there is no comprehensive gift over. Such a gift over can never, after all, be made more than an aid all powerful if you will. It is not a condition. Its assistance —still, I gather, welcomed—may be necessary to neutralize, if not to alter, the meaning of expressions which, standing alone, would appear to be susceptible of only one construction, and that another—as, for instance, the words "then surviving"—but it can, other sufficient indications being present, be dispensed with when, as here, no such heroic service is called for. It is, for instance, plain that *In re Walker's Estate* (2), not apparently adhered to by Hall V.-C. in *In re Horner's Estate* (3), would, with the assistance of a gift over, still be decided as it was; so *In re Benn* (4), although that case involved the construction of the same word in the same clause in two senses, would have been decided differently had there been such a clause; so *Inderwick* v. *Tatchell* (5), where the same difficulty confronted the Court.

(1) 29 Ch. D. 839, 847.
(2) 12 Ch. D. 205.
(3) 19 Ch. D. 186.
(4) 29 Ch. D. 839.
(5) [1901] 2 Ch. 738; [1903] A. C. 120.

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In this will, however, the terms of the gift present no such difficulties to be overcome. Such difficulties as there are disappear, in my judgment, before the other considerations which I have detailed, and I may conclude with some observations of Vaughan Williams L.J. in *Inderwick* v. *Tatchell* (1): "I do not suppose," he says, "that at any time, however much the tide might be in favour of literal construction, it could be said that you are to follow literal construction if, from the four corners of the will, you can ascertain that the literal construction would be contrary to the intention of the testator." That, even apart altogether from Cleasby B.'s point, I believe to be the case here. I therefore, on the whole, decide that the petitioners are entitled to the fund.

Solicitors for the petitioners: *Tatham & Procter.*

Solicitors for the respondents: *W. H. & A. G. Herbert; Barnard & Taylor; Witham, Roskell, Munster & Weld.*

(1) [1901] 2 Ch. 738, 745.

A. C.

In re STONEHAM.

STONEHAM *v.* STONEHAM.

P. O. LAWRENCE J.

1918

Nov. 21, 22; *Dec.* 4.

[1915 S. 3261.]

Administration—Gift of Chattels inter vivos—Chattels in Possession of intended Donee—Parol Gift by Donor—Whether Property passed—Donee appointed Executor—Confirmation by Will.

When chattels capable of delivery are in the possession of the intended donee a parol gift of them by the donor passes the property in the chattels and completes the gift, no further act of delivery or change of possession being necessary. The principle is the same whether the chattels are delivered to the donee before the gift or concurrently with or subsequently to the gift. The principle applies where the chattels have been delivered to the donee before the gift as bailee or in any other capacity so long as they are in his actual possession at the time of the gift to the knowledge of the donor.

Cochrane v. *Moore* (1890) 25 Q. B. D. 57 explained and distinguished.

ADJOURNED SUMMONS.

The question raised by the summons was whether certain chattels, comprising old oak furniture, arms and armour, belonged to the plaintiff Robert Stoneham for his own use, or whether the chattels passed under a general bequest of furniture and effects in the will of the testator to his trustees upon certain trusts.

On July 3, 1914, the testator made his last will and thereby, after confirming the gift he had made to the plaintiff Robert Stoneham "of the furniture and effects in his possession at Beredens," gave all his furniture and effects . . . . (or such of them or such parts thereof as he might not have given away, sold or disposed of in his lifetime or by that his will) to his executors upon certain trusts, and appointed his son, the defendant Frederick Stoneham, his grandson, the plaintiff Robert Stoneham, and two other persons his executors, all of whom proved the will. The testator died in February, 1915.

On February 18, 1916, an order was made on originating summons for the administration of the testator's real and

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personal estate, and one of the inquiries thereby directed was whether the old oak furniture, arms and armour, which formerly belonged to the testator, and were then in the possession of the plaintiff Robert Stoneham (hereafter called the claimant), were given by the testator in his lifetime to the claimant and did not belong to the testator at the time of his death. On July 15, 1918, the master certified in answer to the inquiry that the chattels in question belonged to the claimant. Thereupon the defendant Frederick Stoneham (hereafter called the applicant) took out a summons for an order to vary the master's certificate by finding that the chattels in question were not given by the testator in his lifetime to the claimant but belonged to the testator at the time of his death.

It appeared that the testator owned two residences, one at Brighton and the other, known as "Beredens," in Essex, and that the chattels in question originally belonged to the testator and were kept by him at Beredens. In February, 1910, the claimant went with his family to Beredens, and had resided there ever since. He did this at the request of the testator, who spent the greater part of each year at Brighton, but generally visited Beredens during some part of each year. The claimant alleged that the testator in the spring of 1913, when at Beredens, verbally gave him the chattels in question, and he also relied on the confirmation in his will and his appointment as one of the executors. The applicant alleged that the confirmation in the will referred to a gift of other chattels at Beredens, which the testator verbally gave the claimant in 1911, and he relied on a certain incident which occurred in November, 1914, after the date of the will as tending to negative any gift in 1913 by the testator to the claimant.

The case only calls for a report on a point of law.

Sir J. Butcher K.C. and *MacSwinney* for the applicant. On the evidence there was no gift. But assuming there was a parol gift, the cases show that where there is a parol gift of chattels in the possession of the intended donee the property

in the chattels does not pass unless there is some further act of delivery or change of possession. *Cochrane* v. *Moore* (1) is a direct authority in our favour, and in *Kilpin* v. *Ratley* (2) there was a change in the possession. *Winter* v. *Winter* (3) may be cited against us, but in that case there was change in the manner of possession. The authorities are collected in Halsbury's Laws of England, vol. 15, p. 412. Change of possession without manual delivery will do, but here there is no evidence either of actual or constructive delivery or change of possession. Further, if the gift was incomplete, the chattels remained in the possession of the testator and there was no continuing intention to give. Therefore the defect was not cured by the appointment of the claimant as an executor: *Strong* v. *Bird* (4); *In re Pink.* (5)

Hon. F. Russell K.C. and *H. Freeman* for the claimant. On the evidence there was in fact a gift. As to the law, where chattels capable of delivery are in the possession of the intended donee, the parol gift of them by the donor completes the gift and passes the property, and no further act of delivery is necessary: *Winter* v. *Winter* (3); *Cain* v. *Moon.* (6) But if the gift was incomplete, the confirmation by the will and the appointment of the claimant as executor perfected the gift.

Sir J. Butcher K.C., in reply, cited *In re Wasserberg* (7); *Shower* v. *Pilck* (8); *Cochrane* v. *Moore.* (9)

Jenkins K.C. and *H. Freeman* for the independent executors.

Ward Coldridge K.C. (*K. Preedy* with him) and *Owen Thompson* for other parties interested in the estate.

Cur. adv. vult.

Dec. 4. P. O. LAWRENCE J., in a considered judgment, after stating the facts in detail, held that the parol gift to the claimant of the chattels in question had been fully established,

(1) 25 Q. B. D. 57.
(2) [1892] 1 Q. B. 582.
(3) (1861) 4 L. T. 639.
(4) (1874) L. R. 18 Eq. 315
(5) [1912] 2 Ch. 528, 538.
(6) [1896] 2 Q. B. 283.
(7) [1915] 1 Ch. 195.
(8) (1849) 4 Ex. 478.
(9) 25 Q. B. D. 57, 61.

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and continued: The next point taken on behalf of the applicant is a point of law. It is contended that, even if the testator purported to make the gift as stated by the claimant, yet the gift was not effectual to pass the property in the chattels, because it was not accompanied or followed by delivery nor by any change in the possession of the chattels. This contention raises the question whether a gift per verba de praesenti of chattels in the possession of the intended donee is effectual to pass the property in such chattels without more, or whether it is an essential constituent of such a gift that the donor should first regain possession of the chattels and then hand them back to the donee, or should do some other act equivalent to a further delivery of such chattels. Having regard to the fact that the testator by his last will appointed the claimant as one of his executors and confirmed the gift to him of the furniture and effects in his possession at "Beredens," I am by no means convinced that this question really arises; but as it has been fully argued before me I think it desirable that I should express my opinion upon it.

The applicant relies upon the decision of the Court of Appeal in *Cochrane* v. *Moore* (1), and submits that it is conclusive in his favour. This submission renders it necessary for me to consider that case carefully, because, if it covers the contention of the applicant, I am bound to give effect to that contention, whatever my own opinion may be. That case, in my judgment, clearly affirms the proposition that where chattels capable of delivery are not in the possession of the donee a parol gift of such chattels is not effectual to pass the property in the chattels to the donee unless accompanied or followed by delivery. The subject-matter of the gift in *Cochrane* v. *Moore* (1) was an undivided fourth part of a horse; and although the facts in that case rendered it unnecessary for the Court of Appeal to decide the general question whether delivery is necessary in the case of a parol gift of an ordinary chattel, yet the Court thought the question of such importance that it felt bound to express an opinion upon it. In the result, after an exhaustive examination of the authorities, the Court came to the conclusion that *Irons*

(1) 25 Q. B. D. 57.

v. *Smallpiece* (1) was rightly decided, and had not been overruled by *In re Harcourt* (2) or by *In re Ridgway* (3), and that delivery was necessary to pass the property in the case of a parol gift of an ordinary chattel. On behalf of the claimant, however, it is contended that the rule thus affirmed by the Court of Appeal does not involve the proposition that where the chattel the subject-matter of the parol gift is already in the possession of the donee at the time when the gift is made, a further delivery or a change of possession is necessary in order to render the gift effectual. In my judgment this contention of the claimant is sound, and I will now proceed to state my reasons for coming to this conclusion. In *Cochrane* v. *Moore* (4) the subject-matter of the gift was never in the possession of the donee, and I cannot find anything in the report to suggest that the Court, in affirming the proposition that delivery was necessary in the case of a parol gift of ordinary chattels, intended to hold that where the chattels had already been delivered to the donee any further delivery was necessary; no argument, so far as I can see, was addressed to the Court as to any distinction between a gift of chattels previously delivered to the donee and then in his possession, and a gift of chattels not in the possession of the donee at the time of the gift; nor in my judgment was the Court considering any such question. From a common-sense point of view it seems to me strange that articles already in the possession of an intended donee could not be effectually given by word of mouth without first removing them from the possession of the intended donee and then handing them back to him. In my judgment the foundation of the rule affirmed by the Court of Appeal in *Cochrane* v. *Moore* (4) is that in order to constitute a perfect gift by word of mouth of chattels capable of delivery the donee must have had the chattels delivered into his possession by the donor or by someone on his behalf. In principle I can see no distinction between a delivery antecedent to the gift and a delivery concurrent with or

(1) (1819) 2 B. & Al. 551.
(2) (1883) 31 W. R. 578.
(3) (1885) 15 Q. B. D. 447.
(4) 25 Q. B. D. 57.

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subsequent to the gift. Nor can I see any reason in principle why the rule should not apply to a case where chattels have been delivered to the donee before the gift as bailee or in any other capacity, so long as they are actually in his possession at the time of the gift to the knowledge of the donor. The donor if he wanted to recover the chattels would have to bring an action against the donee whether he had delivered the chattels prior to the gift or the delivery had accompanied or followed the gift, and the donee in such an action could plead the gift as a defence whenever the chattels had been delivered to him and, in the case of a prior delivery, in whatever capacity he had originally received them. As showing that all that the law requires in the case of a verbal gift of chattels is that the property in and the possession of the chattels should unite in the recipient, I refer to the passage in Mr. Nichol's translation of Britton, Lib. II., c. 3, p. 220. (1) That Lord Esher M.R. rests his judgment in *Cochrane* v. *Moore* (2) mainly on the principle I have endeavoured to enunciate appears from the tests and illustrations of complete and incomplete gifts which he lays down and gives (3), and which I need not here repeat. That Fry and Bowen L.JJ., in their joint judgment in that case were not intending to decide that any further delivery is necessary where the thing given is already in the possession of the donee is, I think, shown by their comment on the statement of the law by Brian C.J. in Michaelmas Term 21 Edw. IV., pl. 27, fol. 55. (3) The learned Lords Justices state "that the case appears to go only to this, that if A. after bailing a chattel to B. then gives it to B., B. might defend himself by his suit in an action of detinue. If good law, it seems to establish that delivery first and gift afterwards is as effectual as a gift first and delivery afterwards." It is true that a doubt as to the correctness of the statement of the law by Brian C.J. is suggested by the words "if good law," but if the learned Lords Justices had intended to lay down that a further delivery is necessary where the chattels are already in the possession

(1) Quoted 25 Q. B. D. 66, 67. (2) 25 Q. B. D. 57.
(3) 25 Q. B. D. 69, 70.

of the donee as bailee they could hardly have done otherwise than express their direct dissent from the statement of the law by Brian C.J. No doubt, when commenting on the decision of *Shower* v. *Pilck* (1)—a case in which a gift of chattels then in the possession of the intended donee was made per verba de futuro—the learned Lords Justices (2) emphasize the fact that it was there held that the gift was open to the objection not only that it was made per verba de futuro, but also that it was not accompanied by delivery. In my judgment, however, that case was quoted by the Lords Justices not for the purpose of showing that a further delivery was essential where the chattels were already in the possession of the donee as bailee, but solely for the purpose of showing that in 1849 the Court of Exchequer, notwithstanding several decisions which appeared to cast a doubt on the correctness of the law as laid down in *Irons* v. *Smallpiece* (3), held the view that delivery was still an essential constituent of a complete parol gift of an ordinary chattel. *Flower's Case* (4), cited in *Moore* v. *Cochrane* (5), in my view in no way conflicts with the proposition that a further delivery is unnecessary where a chattel is already in the possession of the donee. The bag of gold which in that case the donee brought did not belong to the donor until it was cast upon the table. All that the donor had until then was a chose in action in respect of the loan which he had made to the donee. In order to establish a valid release of the debt it was essential to prove that the bag of gold had passed into the possession of the donor before he gave it back to the donee. Moreover, there are several cases (in addition to the case before Brian C.J. already referred to) which, in my judgment, tend to support the contention of the claimant. In *Winter* v. *Winter* (6) it was held that a barge in the possession of the defendant, as servant of the plaintiff, was effectually given by word of mouth without further delivery. In that case it was proved that after the gift the donee treated the barge as his own by paying the

(1) 4 Ex. 478.
(2) 25 Q. B. D. 57, 61.
(3) 2 B. & Al. 551.
(4) (1597) Noy, 67.
(5) 25 Q. B. D. 57.
(6) 4 L. T. 639.

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wages of the crew and by working it as his own, and it was sought to distinguish that case from the present on that ground. But in my judgment the conduct of the donee after the gift, although no doubt it afforded strong corroborative evidence of the gift, could not operate as evidence of any further delivery where there admittedly was none. The barge was in the possession of the donee at the time of the gift, and remained in his possession after the gift. The character of the possession no doubt changed by reason of the gift, but that change must always take place where a gift of a chattel then in the possession of the donee as bailee or some other capacity is proved to have been made, and in my judgment the nature or extent of the user of the chattel by the donee after the gift (although it may afford evidence of the gift having been made) cannot afford a test as to whether the gift was, or was not, complete when it was made. The case, however, is not very satisfactory owing, first, to the diversity of the reasons given by the learned judges who decided it; and secondly, to the doubt which seems to have been cast by one of those learned judges on the soundness of the decision in *Irons* v. *Smallpiece*. (1) In *Kilpin* v. *Ratley* (2) the furniture at the date of the gift was in the house occupied by the donee and her husband, and remained in that house after the gift. The county court judge held that as the donor had gone to the house expressly in order to make the gift, had pointed to the furniture in the room where he was when making the gift, and had then departed, leaving the furniture and the donee in the house, there had been such delivery and change in the possession of the whole of the furniture in the house as was reasonably practicable in the circumstances, and that therefore the gift of such furniture was valid and effectual. This decision was affirmed by Hawkins and Wills JJ. In *Cain* v. *Moon* (3) it was held that antecedent delivery to the donee to hold in a different capacity was a sufficient delivery to satisfy the rule requiring delivery in parol gifts of chattels. This case would have been a direct authority in favour of the claimant's contention but for the fact that it was a case

(1) 2 B. & Al. 551. (2) [1892] 1 Q. B. 582.
(3) [1896] 2 Q. B. 283, 289.

of a donatio mortis causa and not a case of a gift inter vivos. It will be observed that the Court decided the case on the footing that as regards delivery a donatio mortis causa stood on precisely the same footing as a gift inter vivos, a view, which if taken in its literal sense, would seem to be inaccurate. See *In re Wasserberg*. (1) Both the learned judges who decided *Cain* v. *Moon* (2), however, were of opinion that in a parol gift of chattels inter vivos any further delivery was unnecessary where the chattels were already in the possession of the intended donee, and Wills J. gives the following illustration: "Suppose a man lent a book to a friend, who expressed himself pleased with the book, whereupon the lender, finding he had a second copy, told his friend that he need not return the copy he had lent him; it would be very strange if in such a case there were no complete gift, the book being in the possession of the intended donee." In the result, after having examined all the authorities to which my attention has been called, I have come to the conclusion that there is no decision which prevents my giving effect to the claimant's contention. I therefore hold that the old oak furniture, arms and armour in question were effectually given by the testator to the claimant in the spring of 1913, and did not belong to the testator at the date of his death.

The claimant, however, further contends that even if the gift was not effectual in law by reason of there having been no further delivery, yet that this defect was cured by his appointment as executor, coupled with the express confirmation of the gift in the testator's will. In my judgment this contention is also sound. Sir J. Butcher and Mr. MacSwinney, in answer to this contention, urged that the gift confirmed by the testator's will was not the gift made by the testator in 1913 but was the gift which he made in the year 1911. They then contended that in order to make the appointment of executor operate so as to enable the claimant to retain the articles in question, it was essential for him to prove that the testator had a continuing intention to abide by his gift of 1913 down to the date of his death,

(1) [1915] 1 Ch. 195. (2) [1896] 2 Q. B. 283, 289.

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citing *Strong* v. *Bird* (1) and *In re Pink* (2) in support of this contention. They further urged that the incident of November, 1914, conclusively proved that the testator had changed his mind before his death, and that, therefore, the claimant, as executor, could not rely upon any countervailing equity to entitle him to retain the article for his own use. In my judgment none of these contentions ought to prevail. The surrounding facts proved in this case, in my judgment, clearly show that the gift which the testator confirmed by his will of July 3, 1914, was the gift which he made to the claimant in the spring of 1913 and not the gift which he made in 1911. This confirmation is, in my judgment, fatal to the applicant's contention based on the incident of November, 1914. The will of July 3, 1914, was left unrevoked by the testator, and became his last will. Any change of mind which the testator may have communicated to the applicant in November, 1914, could not, in my judgment, operate so as to revoke or modify this confirmation. The appointment of the claimant as executor passed the property in the chattels (assuming that they still belonged to the testator at the time of his death) to the claimant, and the gift, being confirmed by the will, became complete. No person claiming as a volunteer under the will can, in my judgment, be heard to dispute the gift. I therefore hold that the applicant fails on all the points he has urged, and that his application to discharge or vary the master's certificate should be dismissed with costs.

Solicitors: *H. G. Campion & Co.; Stoneham & Sons.*

(1) L. R. 18 Eq. 315. (2) [1912] 2 Ch. 528.

H. L. F.

URBAN DISTRICT COUNCIL OF WESTHOUGHTON *v.* WIGAN COAL AND IRON CO., LIMITED.

C. A. 1918 *Oct.* 18, 21, 22; *Nov.* 15.

[1916 W. 51.]

Mining Lease—Covenant by Lessees not to let down Surface—Condition for Payment of Compensation for Subsidence—Subsequent Lease of Surface—Right of Surface Lessees to sue on Covenant—Assign—Covenant running with Land—Right of Support to Surface—Real Property Act, 1845 (8 & 9 *Vict. c.* 106), *s.* 5.

A landowner, whose predecessors in title had demised the minerals under certain lands to the defendants, subject to a covenant by the defendants with them and their assigns not to let down the surface, and a condition for making compensation for any damage done, granted a lease of the surface of the same lands to the plaintiffs (subject to the defendants' lease), reserving liberty to mine without liability for subsidence caused thereby. The defendants having worked the mine so as to let down the surface, thereby causing damage to the plaintiffs' works, the plaintiffs brought an action in the County Palatine Court of Lancaster for damages and an injunction. The Vice-Chancellor refused the injunction, but granted an inquiry as to damages:—

Held (affirming the decision of the Vice-Chancellor), that the benefit of the defendants' covenant ran with the land and could be enforced by assigns, but that the plaintiffs, being merely subsequent lessees without any express assignment of the covenant, were not assigns for that purpose.

But *held*, that the plaintiffs had under their lease the right of support to the surface so far as it was not taken away by the defendants' lease and that the defendants were not entitled by their lease to let down the surface without making compensation as required by their lease

Held, therefore, that the plaintiffs were entitled to damages for the injury caused by the defendants' workings.

Aspden v. *Seddon* (1876) 1 Ex. D. 496; *Taite* v. *Gosling* (1879) 11 Ch. D. 273; *Forster* v. *Elvet Colliery Co.* [1908] 1 K. B. 629; and *South of England Dairies, Ltd.* v. *Baker* [1906] 2 Ch. 631 considered.

APPEAL from a decision of the Vice-Chancellor of the County Palatine of Lancaster.

The plaintiffs were the lessees of certain lands at Westhoughton, in the county of Lancaster, under a lease dated August 25, 1914, granted by the fourth Earl of Ellesmere. The defendants were the lessees of mines and seams of coal under the same and adjoining lands by virtue of a lease dated December 1, 1874, granted by the trustees of the will of Francis, Duke of Bridgewater.

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The action was brought by the plaintiffs for (1.) damage for injury occasioned to the land and buildings comprised in their lease by the working of the defendants' mines; (2.) an injunction to restrain the defendants from working the mines under the plaintiffs' lands so as to cause a subsidence of the surface or damage to the buildings and works thereon; (3.) if necessary, an inquiry as to damages and payment of the amount ascertained; and (4.) an order upon the defendants to cause the surface of the said lands to be sufficiently supported.

The following statement of facts is taken from the written judgment of Swinfen Eady M.R.: "The plaintiffs are the local sanitary authority, and they have their sewerage works, with tanks, filters, percolating beds, sewers, drains, and irrigation channels and works on the surface of the lands in question. The defendants hold under a mining lease, dated December 1, 1874, for sixty years. The plaintiffs hold, under a lease of the surface dated August 25, 1914, for thirty years from February 2, 1914. In each case, however, the respective parties were previously in possession of their demised premises under prior leases which had expired or were surrendered. It is not in dispute that under the terms of the lease of December 1, 1874, the defendants are entitled to work so as to occasion subsidence, but only upon certain terms. The lease of December 1, 1874, is made between the trustees of the will of the Duke of Bridgewater (the lessors), of the first part, Francis Charles Granville Egerton, third Earl of Ellesmere, of the second part, and the defendants (the lessees), of the third part, and thereby the lessors demised and leased unto the lessees from the date thereof for the term of sixty years all so much and such parts of certain named mines, beds, or seams of coal and cannel as then remained unworked and ungotten under certain lands containing in the whole 427a. 2r. 37p., Cheshire measure, with power to work, carry away, sell, and dispose of the same at their will and pleasure, 'they the said lessees, their successors and assigns making such satisfaction unto the said trustees, their heirs or assigns or the lessees, tenants

or occupiers respectively of the said lands, grounds and premises from time to time for all damage to be done or occasioned to the surface thereof or to the soil or produce thereof thereby, or by or in the use and exercise of all or any of the liberties, powers and privileges hereby granted as is hereinafter covenanted and agreed to be made.' The lease contained a provision that if the lessors should require any coal to be left undisturbed and ungotten for the safety and security of any erections or buildings then erected, or which during the term should be erected, upon the land under which the said mines lay, then such coal should be left accordingly, and no rent or payment made in respect of it, nor was any rent or payment to be made for any coal which the lessees in the exercise of a sound and reasonable discretion should consider it necessary to leave unworked for the security of any buildings then standing and being, or which during the said term should be erected and built on the said lands or any part thereof. The lease then contained the following covenant by the lessees with the lessors, their heirs and assigns: 'That they the said lessees, their successors and assigns, shall not, nor will do or commit, or suffer to be done or committed, any act, matter or thing whereby or wherewith, or by reason or means whereof the lands or grounds hereinbefore described or other adjacent or neighbouring lands of the said trustees, or any part thereof, or the houses, outhouses, erections or buildings now standing and being thereon, shall be let in, sunk or in anywise damaged otherwise than by working or getting the same according to the liberties and privileges hereinbefore given or granted and the true intent and meaning of these presents.' Then followed a covenant by the lessees with the lessors, their heirs and assigns, 'that, in case at any time the said lands or grounds shall be sunk, lowered, let in, disturbed, damaged or destroyed, or in case any messuage or dwelling-house or other building or buildings now standing thereon, or which shall be erected and built thereon before the mines thereunder shall be gotten, shall be sunk, lowered, disturbed or injured by, or in consequence of, the setting on foot, working, getting

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or carrying away of the hereby demised mines or any part thereof, or the exercise, use or enjoyment of any of the liberties and privileges hereby granted, they, the said lessees, their successors or assigns, shall and will at their own expense forthwith level, repair, amend and put the same lands, grounds (as far as practicable) and buildings in good and substantial repair and condition.' It is not disputed that according to the true construction of the said lease the mining lessees were thereby empowered to work the minerals, although subsidence and damage were thereby occasioned, upon their complying with the terms of the lease with regard to compensation and reinstatement. The Vice-Chancellor so decided, and the correctness of his decision on this point is not impugned.

"It is contended, however, that under the terms of the subsequent lease to the plaintiffs they did not acquire any right to support. This depends upon the true construction of the plaintiffs' lease. This is dated August 25, 1914, and is made between the fourth Earl of Ellesmere of the one part and the plaintiffs of the other part, whereby the sewerage works, buildings and lands, containing 62a. 2r. 17 p., were demised to the plaintiffs for the term of thirty years from February 2, 1914, the day on which the plaintiffs' previous lease expired. The lease excepts and reserves to the fourth Earl all mines, minerals and other substances whatsoever, whether solid, liquid or gaseous, and all beds of clay and stone in or under the premises, and liberty for him and his lessees, agents and workmen and all other persons authorized by him or them at all times thereafter to win, take away and dispose of the excepted premises as the persons exercising these powers shall think fit, and whether the surface of the premises, 'or any building, sewers, drains, pipes or things now or at any time hereafter erected or constructed thereon or therein shall, or shall not, be lowered, disturbed or otherwise damaged by reason of the exercise of the aforesaid powers or any of them, and without being liable or responsible in any manner for any depression, subsidence, disturbance, damage or injury whatsoever which shall happen in, or be

occasioned to, the surface of the premises, or to any erection, building, engine, machinery, sewers, drains, pipes, matter or thing which may at the time when the damage occurs be upon or in the premises, or for any loss, injury or annoyance which shall happen or be occasioned to the owners or occupiers of the premises by reason of the working and getting (whether by the persons to whom the aforesaid powers are reserved, or by their lessees or any authorized or other persons) of the mines, minerals, quarries and other substance in or under the premises, or in or under any land adjoining or neighbouring thereto, or by reason of the making and using any of such watercourses, ways and works as aforesaid.' The habendum is expressed to be '(subject, nevertheless, to the rights, easements, powers, liberties, authorities and provisions granted by, or contained in, the indenture specified in the second schedule hereto).' And the second schedule contains the said lease of December 1, 1874, to the defendant company. The lease also contains the following proviso: 'Provided always that no liability shall be incurred by the fourth Earl or his lessees or other persons exercising the powers to win and work mines, minerals, quarries and other substances and other powers hereinbefore reserved by reason of any depression, subsidence, disturbance, damage or injury which shall happen, or be occasioned, to the surface of the premises or to all or any of the buildings, machinery, sewers, drains, pipes, matters or things which may now or at any time hereafter be erected, constructed or placed thereon or therein, or on account of any loss, injury or annoyance which shall happen, or be occasioned, to the occupiers thereof by reason of the working and getting (whether before or after the execution of these presents) of the mines, minerals or other substances in or under the premises or within or under any adjoining or neighbouring lands or by reason of the making and using (whether before or after the execution of these presents) of any watercourses, ways and works hereinbefore referred to.'"

The plaintiffs by their pleadings alleged, and the defendants denied, that the plaintiffs' lessor was successor in title to the

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defendants' lessors. All that appeared in the evidence as to that question was that the plaintiffs' lessor was possessed of the Bridgewater Estates under a resettlement made after the date of the defendants' lease, and that the defendants recognized his title to the reversion expectant upon their lease.

At the trial the Vice-Chancellor refused the injunction which the plaintiffs claimed, but granted an inquiry as to the damages alleged to have been caused to them by the defendants' workings.

The defendants appealed. The appeal was heard on October 18, 21, 22, 1918.

P. O. Lawrence K.C., *Cyril Atkinson K.C.*, and *C. E. R. Abbott* for the appellants (the defendants). It is submitted that the defendants have not infringed any legal right of the plaintiffs. The plaintiffs are not entitled to the benefit of the defendants' covenants because (*a*) there is no privity of contract between the plaintiffs and defendants; (*b*) the plaintiffs are not "assigns" of the reversion; (*c*) the benefit of the covenant is not expressly assigned to them; (*d*) the covenant, so far as it is for the benefit of the occupiers for the time being, cannot be enforced; (*e*) the right to compensation under the defendants' lease is expressly excepted from the plaintiffs' lease.

A lessee of the covenantee is not an "assign" within the meaning of the covenant: *Spencer's Case.* (1) *Taite* v. *Gosling* (2) has always been treated like *Tulk* v. *Moxhay* (3) as a case of restrictive covenant. If assignees included lessees the defendants would be under a double liability, as they are still liable to the lessors.

The plaintiffs cannot sue as "occupiers" under the covenant in the defendants' lease as the plaintiffs' lease was not in existence at the date of the defendants' lease. In *Forster* v. *Elvet Colliery Co.* (4) Cozens-Hardy M.R. pointed out that a covenant with the occupier or occupiers for the time being would plainly be bad.

(1) (1583) 5 Rep. 16a; 1 Sm. L. C., 12th ed., 62, 86.
(2) 11 Ch. D. 273.
(3) (1848) 2 Ph. 774.
(4) [1908] 1 K. B. 629, 635.

No right of support is granted to the plaintiffs by their lease. The plaintiffs' lease is expressly subject to the defendants' lease, so that the plaintiffs' common law right to support is cut down by the defendants' lease, which gives the defendants a right to let down the surface: *Davis* v. *Treharne* (1); *Eadon* v. *Jeffcock*. (2)

The plaintiffs have contracted themselves out of the right to sue. They took the land as between themselves and their lessor subject to the risk of its being let down, and without any right to compensation.

The defendants can take advantage of the stipulations in the plaintiffs' lease although they are not parties to it: Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 5.

Jenkins K.C. and *A. G. Roby* for the respondents (the plaintiffs). The plaintiffs rest their case on their right to the benefit of the provisions of the defendants' lease. There is nothing in that lease which excepts that right.

The defendants are not authorized by their lease to let down the surface at all. If they rely on their lease as authorizing them to do so, they are bound by the condition in it to make compensation. They cannot approbate and reprobate.

The plaintiffs, as occupiers of the surface, are entitled to support except as far as it is taken away from them by their lease.

Aspden v. *Seddon* (3) was a decision on the construction of a covenant; it was not decided on any question of privity of contract.

[SWINFEN EADY M.R. On the facts there the plaintiff was the assign of the reversion.]

Here the defendants covenanted with the reversioners to compensate their lessees or the occupiers if their works caused subsidence. The plaintiffs are lessees and occupiers' they have proved damage, and are therefore entitled to compensation. Prima facie, the defendants are wrongdoers. Unless the defendants justify under their lease there is a clear

(1) (1881) 6 App. Cas. 460, 466. (2) (1872) L. R. 7 Ex. 379, 397.
(3) 1 Ex. D. 496.

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cause of action for trespass. See *Aspden* v. *Seddon* (1) per Herschell arguendo.

A person exercising a right which interferes with another person can only do so if he complies with the conditions subject to which he is entitled to exercise that right.

The plaintiffs need not show that they are assigns of the whole estate of the reversioner.

Lessees are entitled to the benefit of a covenant as assigns. *Taite* v. *Gosling* (2) is a distinct authority on this point. *Tulk* v. *Moxhay* (3) deals with the burden and not with the benefit of a covenant. Here the covenant was for the benefit of the surface, which has been demised to the plaintiffs.

[EVE J. referred to *South of England Dairies, Ltd.* v. *Baker.* (4)]

Our sheet-anchor is *Aspden* v. *Seddon.* (5)

Cyril Atkinson K.C. in reply. Under s. 10 of the Conveyancing Act, 1881, the benefit of the lessee's covenant runs with the land.

[SWINFEN EADY M.R. The defendants' lease was made before the Act.]

The plaintiffs are not assigns. The judgment in *Taite* v. *Gosling* (2) is based on a fallacy. A person is not an assign unless he is in of the same estate as the covenantee: *Spencer's Case.* (6) The grantee of the whole reversionary interest in a part of the property is not an assignee of the reversion: *Wright* v. *Burroughes.* (7)

[SWINFEN EADY M.R. Have the defendants, as against the plaintiffs, any right to work without complying with the condition as to compensation?]

Yes; there is no condition that they should reinstate at the instance of the lessees. Qua occupiers they could not enforce the covenant: *Forster* v. *Elvet Colliery Co.* (8)

[SWINFEN EADY M.R. Why could not the Duke's trustees enforce the condition for the benefit of the occupiers?]

(1) 1 Ex. D. 501.
(2) 11 Ch. D. 273.
(3) 2 Ph. 774.
(4) [1906] 2 Ch. 631.
(5) 1 Ex. D. 496.
(6) 5 Rep. 16a; 1 Sm. L. C., 12th ed., 86.
(7) (1846) 3 C. B. 685.
(8) [1908] 1 K. B. 629, 635, 636.

That is a very different thing from the plaintiffs doing it. [DUKE L.J. referred to *Dyson* v. *Forster*. (1) SWINFEN EADY M.R. The defendants have only a conditional right of working on making compensation.] That is not a condition which the plaintiffs can enforce.

Cur. adv. vult.

Nov. 15. SWINFEN EADY M.R. This action was brought to obtain an injunction restraining the defendants from working coal so as to let down and damage the plaintiffs' land, buildings and works. The Vice-Chancellor of the County Palatine of Lancaster refused an injunction on the ground that the defendants under the terms of their lease were entitled to work and remove coal, although thereby occasioning subsidence and damage to the plaintiffs, but he granted an inquiry as to damages, holding that by the terms of their lease the defendants were bound to compensate the plaintiffs for the damage caused by their works.

The defendants appeal, and contend that having regard to the terms of the plaintiffs' lease the plaintiffs have not any right of support as against the defendants, and they also contend that in any case the plaintiffs cannot sue the defendants for compensation for any damage occasioned, as they are not assigns of the benefit of the covenant which provides for the compensation. Both surface and minerals form part of the Bridgewater settled estates.

[His Lordship stated the facts and the material provisions of the defendants' lease of 1874 and of the plaintiffs' lease of 1914, and referring to the latter, continued :] This lease enables the fourth Earl and persons claiming under him to cause subsidence to lands and buildings demised by the lease, by removing coal without being liable for any loss or injury thereby occasioned, but it does not enable the defendants to do so. Their powers are defined by the lease of December 1, 1874, and are not enlarged by the form of the subsequent demise by the fourth Earl to the plaintiffs.

The plaintiffs acquired by their lease such right of support

(1) [1909] A. C. 98.

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Swinfen Eady M.R.

as the fourth Earl could give them, except in respect of acts done by the fourth Earl or persons claiming under him. The defendants do not derive title under the fourth Earl, but under his predecessors in title, the Bridgewater trustees. The plaintiffs' lease is expressly made subject to the defendants' lease; they take with notice of the defendants' right to occasion subsidence, but only upon the terms conferring such right. The fourth Earl could, and in my opinion did, grant to the plaintiffs a right to have their surface supported by the coal previously granted to the defendants, except so far as such support should be withdrawn upon the terms of the defendants' prior lease; and the defendants are not entitled to insist upon their right to occasion subsidence while at the same time failing to observe the terms upon which alone that right was granted to them.

It was urged that the words which occur twice in the proviso "(whether before or after the execution of these presents)" assisted the contention that the plaintiffs' lease gave to them no right of support, as against persons working and removing coal under grants made before the execution of the plaintiffs' lease as well as under grants subsequent to it. This argument is not well founded. The words in question refer to the date of the working of coal or the making and using ways and works which occasion the damage; that is, whether such acts are before or after the execution of the plaintiffs' lease, but in each case the words refer only to working, making or using by the fourth Earl, or persons claiming under him, and do not extend to the acts of grantees under titles prior to the estate of the fourth Earl.

The result therefore is that according to the true construction of the respective leases, the surface of the plaintiffs' premises can only be let down by the defendants upon the terms of their complying with the provisions of their lease, and that the defendants do not possess the right which they claimed—namely, to let down the plaintiffs' land and buildings without being under any obligation whatever to the plaintiffs for so doing.

The next question is whether any distinction can be

drawn between the plaintiffs' land and the buildings upon the land. The condition for making satisfaction to the trustees, their heirs or assigns, or the lessees, tenants or occupiers, extends to all damage to the surface or to the soil or produce thereof "as is hereinafter covenanted and agreed to be made." The subsequent covenant provides that if any lands are sunk or damaged or any present or future buildings lowered or injured by the coal working, the lessees will at their own expense forthwith level, repair and put the same lands (as far as practicable) and buildings in good and substantial order, repair and condition. The effect of the reference in the condition to the subsequent covenant is to define the extent of the condition by the language of the covenant, and is as if the language of the covenant had been expressed in the condition itself. The result is that the condition as well as the covenant extends to levelling the lands as far as practicable and putting the buildings into good and substantial repair.

The remaining question is: What remedy, if any, have the plaintiffs, by reason of the defendants' failure to fulfil their obligations? The defendants insist that the plaintiffs have not any remedy whatever; they contend that they cannot sue upon the covenants in the lease to which they are not parties; that they are not assigns of the covenantees or of the benefit of the covenant, and that there is no privity between the plaintiffs and the defendants.

They also insist that the plaintiffs cannot enforce the condition for compensating the lessees, tenants or occupiers of the surface, as although the language used may amount to a covenant if so intended (for which see 3 Com. Dig., Covenant A 2; *Rashleigh* v. *South Eastern Ry. Co.* (1); *Russell* v. *Watts* (2)), yet such a covenant with "the occupiers for the time being" would be invalid and incapable of being enforced.

It is true, as Cozens-Hardy M.R. pointed out in *Forster* v. *Elvet Colliery Co.* (3), that a covenant with the "occupier or occupiers for the time being" would be plainly bad; and

(1) (1851) 10 C. B. 612, 632. (2) (1885) 10 App. Cas. 590, 611.
(3) [1908] 1 K. B. 629, 635.

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the plaintiffs could not have been made parties to the lease of 1874, as the term in respect of which they are now suing was not created until 1914, and the provision of the Statute 8 & 9 Vict. c. 106, s. 5, does not therefore assist them in this respect.

The question then arises whether the plaintiffs can sue as assigns of the original covenantees, the Bridgewater trustees. The covenant by the defendants with the Bridgewater trustees, their heirs and assigns, is obviously a covenant for the benefit of the land retained by the lessors, that is the surface above the minerals granted; it is a covenant "respecting any tenements or hereditaments" within s. 5 of 8 & 9 Vict. c. 106; the covenant is made with persons who had an interest in the land, the surface to which the covenant refers, and the covenant touches or concerns the land. The covenant is, therefore, to be deemed to be annexed to the land; the benefit of it runs at law with the land; and the assignee can sue upon it. See *Rogers* v. *Hosegood*. (1) Cozens-Hardy M.R. in *Forster* v. *Elvet Colliery Co.* (2) said: "I see no reason why the covenant to pay compensation for damage caused by the subsidence of the surface should not be a covenant to which this principle applies." The covenant to restore land and repair buildings is an à fortiori case."

It was, however, urged that a lessee is not an "assign," and that even if a subsequent owner of the surface could sue upon the covenant a lessee is not in of the same estate as the original covenantees had.

If the condition as to making satisfaction, in manner expressed in the covenant, for all damage done, be read as a restrictive covenant restraining the getting of coal so as to cause damage to land and buildings except upon the terms of making satisfaction, then the plaintiffs would be entitled to enforce the restriction: *Child* v. *Douglas* (3); *Rogers* v. *Hosegood* (1); *Elliston* v. *Reacher* (4); *Taite* v. *Gosling*. (5) It has been determined that a "lessee" is, in the view of

(1) [1900] 2 Ch. 388.
(2) [1908] 1 K. B. 629, 635.
(3) (1854) Kay, 560, 568.
(4) [1908] 2 Ch. 374, 384, 665.
(5) 11 Ch. D. 273.

a Court of Equity, an assign for the purpose of enforcing a negative restriction against a person bound by it: *Taite* v. *Gosling*. (1)

In cases, however, not arising between landlord and tenant I am of opinion that a lessee (who is not an express assignee of the benefit of the covenant) is not an " assign " of an owner in fee for the purpose of obtaining damages for breach of a covenant entered into with such owner in fee his heirs and assigns. See *Rogers* v. *Hosegood* (2); *South of England Dairies, Ltd.* v. *Baker*. (3) The plaintiffs, however, are entitled to have their surface supported, unless they are deprived of support pursuant to and upon the terms of the 1874 lease, and it is not open to the defendants to insist upon their lease as entitling them to let down the surface, while repudiating the terms and conditions upon which their authority is granted. The defendants in the past have worked coal without making satisfaction to the occupiers of the surface as their lease required them to do, and they claim the right to continue to do so, and they threaten and intend to pursue the same course of conduct, denying that the plaintiffs have any remedy.

Even if they had not actually done this in the past, as they claim the right to do it as against the plaintiffs, they are liable to be restrained by injunction: *Tipping* v. *Eckersley* (4); *Hext* v. *Gill* (5); *Shafto* v. *Bolckow, Vaughan & Co.* (6) In *Aspden* v. *Seddon* (7) the Court refused the injunction, accepting the contention of the defendants that they had a right to work the coal on paying damages, and the plaintiffs subsequently at law recovered damages. (8) It is true that in that case the plaintiffs were the subsequent owners of the surface and buildings, for the benefit of which the covenants had been entered into, and were not merely lessees, but the judgment did not proceed on that ground. The ground of the decision was that the defendants were trespassers, and wrongdoers unless they could justify under their deed, and they could only do that upon the terms of the deed, paying

(1) 11 Ch. D. 273.
(2) [1900] 2 Ch. 388.
(3) [1906] 2 Ch. 631.
(4) (1855) 2 K. & J. 264, 270.
(5) (1872) L. R. 7 Ch. 699, 711.
(6) (1887) 34 Ch. D. 725, 729.
(7) (1875) L. R. 10 Ch. 394.
(8) 1 Ex. D. 496.

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compensation. In the Divisional Court Cleasby B. refused to put the case on the ground of any liability arising out of contract. He rested the case simply upon the fact that during the time the defendants had enjoyed the mines and the conditional licence to work, the obligation to make compensation for damage, caused during the same period, had arisen. In the Court of Appeal the judgment was sustained on the same ground. (1) The right to let down the surface was subject to the condition of making compensation to the party damaged, who could sue for the loss occasioned to him because he was the person damaged, and not by virtue of any privity of contract between himself and the mine owner.

The same considerations apply here. The plaintiffs are entitled to sue for injury to their common law right of support, and the defendants cannot justify their acts, as authorized by the terms and conditions of their lease unless they comply with such terms and conditions.

For these reasons I am of opinion that the conclusion at which the Vice-Chancellor arrived was right in substance, although the form of the judgment requires some modification. EVE J. concurs in this judgment.

DUKE L.J. The facts upon which this appeal arises have been stated by the Master of the Rolls, and I shall not recapitulate them. The defendants base their appeal upon three principal contentions: (1.) that no right of support had been granted to the plaintiffs by their lessor; (2.) that the defendants were entitled to rely on the reservation in favour of the plaintiffs' lessor and others contained in the plaintiffs' lease; and (3.) that the conditions and covenants with regard to damage by subsidence contained in the defendants' lease did not run with the lands demised to the plaintiffs so as to give any rights to the plaintiffs against the defendants in respect of any damage by subsidence of those lands caused, or to be caused, by the defendants' operations in mining and winning coal.

(1) 1 Ex. D. 496.

As to the first and second contentions of the defendants, the position seems to me to be clear. The plaintiffs have a good demise of land from a competent lessor. The exception or reservation in the plaintiffs' lease, which excepted or reserved a right to enter and mine and to cause subsidence without liability for damage, was made in favour of their lessor and persons authorized by him, and the defendants are not within its terms. They therefore stand as regards the plaintiffs in the position of owners of minerals who have let down the lands superjacent to the minerals by withdrawing the support which, in their natural condition, those lands enjoyed. Prima facie an owner of land is entitled to the surface and all below it ex jure naturæ, and it is for those who claim to derogate from that right to establish a title in themselves to do the things done or claimed to be done. This was made clear by Lord Wensleydale in *Rowbotham* v. *Wilson*. (1) In *Davis* v. *Treharne* (2) also Lord Blackburn emphasised the principle that the right of support exists unless it is taken away. "It must be taken as perfectly settled ground," Lord Blackburn said, "that as of common right the surface land has a right to be supported by subjacent strata of minerals. Although that is common right, it may be shown . . . . that the person who has got the surface obtained it either upon terms which would give him no right to support . . . . or that before he got it . . . . the owner of the surface had parted with the right of support from below, in which case of course the owner of the surface could be in no better position than the person who sold it to him. In common right the person who owns the surface has a right to have it properly supported below by minerals." In *Eadon* v. *Jeffcock* (3) Bramwell B. explained that the severance of the mines from the rest of the soil creates a relationship between the respective owners in which, until something to the contrary is shown, it is to be taken that "those entitled to the mines, and those entitled to the residue of the soil, must each so use his part as not

(1) (1860) 8 H. L. C. 348, 360. (2) 6 App. Cas. 460, 466.
(3) L. R. 7 Ex. 379, 395, 396.

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to injure the other," and he founded this rule upon the maxim sic utere tuo ut alienum non laedas.

The general rule being that which I have stated, what right do the defendants in this case show to derogate from the plaintiffs' natural right of support? They produce a lease which grants them, at best, a right to cause subsidence upon the terms that they shall make certain compensation for any damage they may thereby cause. It is hard to see upon what ground they can assert the right and disregard the qualification. The author of the Touchstone (Shep. Touch., c. 4, p. 73) wrote long ago that "when a deed is showed in court, the adverse party may take any advantage by it that it will afford him," and it is the same principle, I think, which is illustrated in the case relied on by the plaintiffs in this action of *Aspden* v. *Seddon*. (1) There an owner in fee had granted away part of his lands, reserving to himself, his appointees, trustees and assigns, the minerals under the same, with liberty to enter and work under a reservation which concluded with the proviso "so that compensation in money be made by him or them for all damage that shall be done." The lands so granted had become the property of the plaintiff in the action. The defendants had become entitled to the minerals and to the lands of the plaintiff's grantor which were not included in the plaintiff's grant, and in working the minerals had let down the plaintiff's land. The plaintiff instituted a suit in Chancery to restrain the defendants from working so as to cause an injury to him, and failed on the ground that the defendants were entitled by their grant to work the mines and that the plaintiff's right, if any, was to recover damages at law. In the plaintiff's action at law he was met by the contention raised by the defendants in the present action—namely, that there was no privity between the parties. Bramwell B. summarized the case in this way (2): "The owner of the surface I will say—I will suppose the two estates to be effectually severed—granted to the owner of the subjacent mines a right to take the whole of the coal and minerals underneath, though in

(1) 1 Ex. D. 496. (2) 1 Ex. D. 503.

so doing the surface and what was on it should be let down, but he granted that right, and he gave that licence, so that compensation in money be made by the grantee or his assigns for all damage that should be done in the exercise of what are called the excepted liberties, or in consequence thereof. The defendant is an assignee of the mines, and he has under and by virtue professedly—because, unless it is so, it is a tortious act on his part—of that licence so granted to him, worked his mines in such a way as to let down the plaintiff's surface. Then the plaintiffs say, You having exercised the licence which was coupled . . . . with that corresponding duty on your part, you . . . . must now make me compensation. This the defendants have refused to do. It really does seem to me plain that they are bound to make that compensation." The defendants appealed, and the judgment of the Exchequer Division was affirmed in the Court of Appeal on the explicit ground that where the right to take minerals is granted or reserved subject to a condition for compensation, the law is that the man who has exercised this right is to pay for the damage, and that a person who is entitled to the possession of the surface may recover compensation for the injury caused to him by acts of the owner or lessee of the minerals, which are authorized by his conditional grant, and which, without the grant, would as against that person be acts of trespass.

It is not necessary, in my opinion, to determine for the purposes of this case whether the defendants are right or wrong in their contention that the plaintiffs cannot claim the benefit of the defendants' covenant as a covenant which runs with the land whereof part has been demised to the plaintiffs. That it runs in favour of the covenantee and his heirs and assigns I think is plain from the opinion of Lord Macnaghten in *Dyson* v. *Forster*. (1) It is a covenant which affects the nature and the value of the land. The defendants denied that the plaintiffs' lessor was an assignee, his estate not being shown to be derived from the covenantees, and they contended that if he were an assignee his lessee of part of the lands in respect of which the covenant was made

(1) [1909] A. C. 98, 102.

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could not maintain an action for breach of the covenant. The statute of 32 Hen. VIII. c. 34, and alternatively the Real Property Act, 1845, were relied upon by the plaintiffs, with the aid of the decision in the Court of Appeal and the House of Lords in *Forster* v. *Elvet Colliery Co.* (1) and *Dyson* v. *Forster* (2), and the decision of Fry L.J. as a judge of first instance in *Taite* v. *Gosling.* (3) I was not convinced of the existence of any rule of law which necessarily excludes the plaintiffs from the enjoyment of any right incident to their enjoyment of the lands demised to them which their lessor was able to grant and did not withhold, or that if there is a cause of action which they and their lessor could jointly assert they ought not to have the advantage of it in a properly constituted suit. The reasons which underlie the common law rule as to the destruction of a condition by the severance by act of parties of the estate which was subject to the condition do not seem to me to apply to the case of a covenant. But, as I have said, the decision of the questions which are raised by the defendants with regard to these matters is not necessary in this action. I am of opinion for the reasons I have stated as to the main question in the case that the appeal ought to be dismissed.

I agree that the judgment below should be modified as has been mentioned by the Master of the Rolls.

Appeal dismissed.

NOTE.—The order, as varied by the Court of Appeal, was (so far as material) as follows:—

"This Court doth order that the said judgment except so far as it directs taxation and payment of costs be reversed. And this Court doth declare that as from 2nd. February, 1914, and during the continuance of the Defendants' lease of 1st December, 1874, the Plaintiffs are entitled to require the Defendants (if they continue to exercise the rights of getting coal by their said lease granted to them) to observe and perform the conditions of the same lease, under which alone they are entitled to occasion subsidence and damage to the premises in the occupation of the Plaintiffs. And doth also declare that the Defendants are liable to pay to the Plaintiffs the amount of all damage to land or buildings which the Plaintiffs have sustained since the 2nd February, 1914, through the Defendants' work-

(1) [1908] 1 K. B. 629. (2) [1909] A. C. 98, 102.
(3) 11 Ch. D. 273.

ings and by reason of the Defendants not having performed their obligations under the said lease, and doth order that the following inquiry be made that is to say:—An inquiry whether the amount of damage to land and buildings respectively which the Plaintiffs have sustained since the said 2nd February, 1914, through the Defendants' workings and by reason of the Defendants not having performed their obligations under their said lease. And it is ordered that the Defendants do pay to the Plaintiffs what shall be certified in answer to the said inquiry. And the costs of the said inquiry are reserved. And the Plaintiffs are to be at liberty to apply in Chambers as to payment of the amount found due in answer to the said inquiry. And the Plaintiffs are to be at liberty to apply for an injunction to restrain the Defendants from working coal under the provisions of the lease of the 1st December, 1874, so as to damage the Plaintiffs' land or buildings without performing their obligations under their said lease. And it is ordered that the Defendants do pay to the Plaintiffs their costs occasioned by the said appeal, such costs to be taxed by the Taxing Master."

Solicitors: *Rawle, Johnstone & Co., for Peace & Ellis, Wigan; Grundy, Kershaw, Samson & Co., for J. Hodgkinson, Bolton.*

W. I. C.

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In re CONSTABLE'S SETTLED ESTATES.

[1918 C. 462.]

Settled Land—Settlement by Will—Tenant for Life—Disentailing Deed and Resettlement—New Life Estate "in restoration and by way of confirmation of" the Life Estate under the Will—Power of Tenant for Life to exercise extended Powers under Resettlement—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 20.

At the date of a disentailing deed lands were settled by a will to the use of G. for life, with remainder to his son C. in tail male. In 1895 G., under powers in the will, appointed a jointure to his wife and portions for his younger children. In July, 1912, G. and C. disentailed the estate by a deed by which it was conveyed (subject to charges and incumbrances and to G.'s life estate) to such uses as G. and C. should jointly appoint, and in default of appointment to the uses and upon the trusts of the will. In October, 1912, a deed of resettlement was executed by G., C., and the trustees, by which the property was appointed and conveyed, subject to the mortgages on the inheritance and the same jointure and portions, to such uses and subject to such powers and provisions as G. and C. should jointly appoint, and subject to any such appointment to the use of G. for life "in restoration and by way of confirmation of" his life estate under the will and all powers of jointuring and charging portions and all other statutory powers annexed to or exercisable during the continuance of that life estate, and so that they might be exercisable with the same overreaching effect as if the disentailing deed and the deed of appointment had not been executed, with remainder to the use of C. for life, with remainder to the use of his sons successively in tail male. This deed also declared that the persons or person who should for the time being be constituted or be the tenant for life of the settlement under the Settled Land Acts might exercise over the settled lands certain specified powers by way of extension or enlargement of the powers and provisions of those Acts as if conferred thereby (the facts being admittedly indistinguishable from those in *In re Cornwallis-West and Munro's Contract* [1903] 2 Ch. 150):—

Held (reversing the decision of Sargant J.), that G. was tenant for life under the resettlement of the property thereby settled, and as such could exercise over that property the powers by the Settled Land Acts, 1882 to 1890, and by the resettlement conferred on a person for the time being tenant for life within the meaning of those Acts.

The object of inserting the clause containing the words "in restoration and by way of confirmation" of a previous life estate was to keep alive the powers incident to the estate and conferred on the tenant for life by the original instrument. Such a clause showed an intention to keep alive the old powers, but was ineffectual to restore the original life estate when the operative words of the deed were sufficient to pass it. *Alexander* v. *Mills* (1870) L. R. 6 Ch. 124 showed that it was unnecessary to restore

the old life estate in order to keep alive the powers. If and so far as *In re Cornwallis-West and Munro's Contract* (1903) 2 Ch. 150 determined that the vendor in that case was tenant for life under the will, and not under the resettlement, and that he could not, as tenant for life under the resettlement with concurrence of the jointress and mortgagees joining to release their interests, convey the property in fee to a purchaser, that decision was erroneous.

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SIR THOMAS ASTON CLIFFORD CONSTABLE, by his will, made in 1869, devised all his real estate to the use of the trustees thereof, subject to certain mortgages then existing and to further mortgages to be created under the powers of the will, upon trusts for raising thereout sums in aid of his personal estate (for purposes since satisfied), and out of the rents and profits thereof to make certain annual payments (which afterwards ceased to be payable). And subject thereto the real estate was to be held by the trustees upon the trusts thereinafter mentioned. The testator then devised the real estate to his son, Sir Talbot Constable, for life, with remainder (subject to certain uses in favour of the issue of his said son and his own other children and their issue) to the use of testator's sister, Lady Chichester, for her life, with remainder to the use of her eldest son, Charles, for his life, with remainder to the use of every son of Charles and his issue male in succession, so that every eldest son of Charles and his issue male might be preferred to every younger son and his issue male according to seniority in tail male, but so that every such son of Charles born in testator's lifetime might, in lieu of such estate in tail male, take an estate for life, with remainder to his first and every other son successively in order of seniority in tail male, with remainders over on the failure of such issue of Charles.

The testator made it a condition precedent to the taking by Sir Talbot Constable or his issue of any estate under the will that Sir Talbot should execute a disentailing deed and settle all the lands comprised in a post-nuptial settlement of the testator to the use of Sir Talbot for his life, with the same remainders, to the use of the same persons, and for the same estates, and generally in the same manner as the testator had devised the bulk of his real estate, but not so as to increase or

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multiply charges. The will also empowered every tenant for life, when entitled in possession, to charge the devised estates with a jointure rent-charge in favour of any wife, and with portions for younger children, and gave the trustees the usual powers of sale and exchange with the consent of the tenant for life for the time being.

Testator died in 1870, and Sir Talbot Constable was the only son he ever had.

In December, 1870, after the testator's death, and in 1871, Sir Talbot executed two deeds, by the former of which he disentailed the post-nuptially settled property, and by the latter of which he settled that property to the uses and subject to the powers and provisions subject to which, according to the true construction of the will, the property comprised in the settlement ought to be limited so as to comply with the condition precedent imposed by the will.

Lady Chichester died in 1876, and her son, Charles, died in 1891. His first son died in the testator's lifetime, and his second son, Colonel George Constable (who assumed the name and arms of "Constable"), was born in the testator's lifetime, and was married in 1888.

Sir Talbot Constable died without issue in 1894, and in 1895 Colonel George Constable, in exercise of his powers under the will, appointed a jointure rent-charge in favour of his wife and charged the settled estates with portions for his younger children.

There was issue of that marriage six children, all of whom attained the age of twenty-one years, the eldest being Captain Sir Raleigh Constable, who attained the age of twenty-one in December, 1911. Colonel Constable's wife was still living.

By a disentailing deed, dated July 22, 1912, Colonel Constable and Captain Constable, with the consent of the former as protector of the settlement, according to their respective estates and interests conveyed the settled estates, subject to the charges and incumbrances affecting the same and to the estates and charges prior to, and the powers overriding, the estates in tail male limited to Captain Constable under the will and settlement of 1871, other than the estate of Colonel

Constable during his life, but freed and discharged from all estates in tail male or in tail of Captain Constable, at law or in equity, and all estates and powers to take effect after the determination or defeasance of such estates in tail male, to such uses as Colonel Constable and Captain Constable should jointly appoint, and, in default of and until such appointment, to the uses, upon the trusts, and subject to the powers and provisions subsisting and capable of taking effect under the will and the settlement in and over the same immediately before the execution of the disentailing deed, so as to restore and confirm the same uses, powers, and provisions.

By a deed of October 22, 1912, the settled estates were, in exercise of the joint power of appointment in the disentailing deed, appointed, and the trustees conveyed any outstanding legal estate in the same, subject to the mortgages affecting the inheritance and to the jointure and portions created in 1895, to such uses and subject to such powers and provisions as Colonel Constable and Captain Constable should jointly appoint, and, in default of and subject to any such appointment, to the use of Colonel Constable and his assigns for his life, "in restoration and by way of confirmation of the life estate or estates limited to him by the will and the settlement of 1871 respectively," and of all powers of jointuring and charging portions, and all other statutory powers annexed to or exercisable during the continuance of such life estate or estates, and so that they might be exercisable with the same overreaching effect as if the disentailing deed and the deed of appointment had not been executed, with remainder to the use of Captain Constable during his life, with remainder to the use of the first and every other son of Captain Constable successively, according to seniority, in tail male. The trustees of the resettlement were appointed trustees for the purposes of the Settled Land Acts. And it was declared that the persons or person who should for the time being together constitute or be the tenant for life of the settlement within the meaning of the said Acts might exercise over the lands thereby settled certain specified powers by way of extension or enlargement of the powers and provisions of the said Acts as

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if the same had been conferred by the said Acts. Then followed certain extended or enlarged powers, including a power to raise money on mortgage for various purposes and powers of applying capital moneys.

Colonel Constable, being desirous of exercising, as tenant for life of the resettlement of October 22, 1912, with the consent of the jointress and portioners, the statutory powers conferred on a tenant for life by the Settled Land Acts, and also the extended or enlarged powers conferred by that resettlement, applied by originating summons for a declaration that he was tenant for life under the resettlement within the meaning of the Acts, and that he could, as such tenant for life, exercise (subject to incumbrances having priority to the resettlement) all the statutory powers, and the extended and enlarged powers conferred by the resettlement.

Captain Constable and the trustees were the respondents to the summons.

The summons was heard by Sargant J. on June 28, 1918.

Harold Burrows for the applicant. Colonel Constable is tenant for life under the resettlement, and in that capacity can exercise both the statutory powers and express enlarged powers. The decision of Farwell J. in *In re Cornwallis-West and Munro's Contract* (1) that the old life estate was restored and that the tenant for life could not give a good title under the resettlement cannot be supported. It is adversely criticized in Cyprian Williams' Vendor and Purchaser, 2nd ed., pp. 320-323. The original life estate here was not restored in order to revive it, but to keep alive the powers incident to that estate. The old life estate has been extinguished and a new life estate has been created by the resettlement. Whether the old life estate has been extinguished or created de novo, it is under the resettlement that Colonel Constable is tenant for life. [He also referred to *In re Mundy and Roper's Contract* (2); *In re Lord Wimborne and Browne's Contract* (3); Key and Elphinstone's Precedents in Conveyancing, 10th ed., vol. ii.,

(1) [1903] 2 Ch. 150. (2) [1899] 1 Ch. 275.
(3) [1904] 1 Ch. 537.

p. 790; Davidson's Precedents in Conveyancing, 3rd ed., vol. iii., part 1, p. 596; part 2, p. 1030; and Sugden on Powers, 8th ed., p. 70, par. 18.]

G. R. Northcote for the trustees. Colonel Constable is not tenant for life under the resettlement, and cannot exercise the extended powers which are said to be exercisable under it. The old tenancy for life is preserved: *In re Wright's Trustees and Marshall.* (1) The original powers can only be kept on foot as incident to the old life estate. *In re Cornwallis-West and Munro's Contract* (2), as explained in *In re Lord Wimborne and Browne's Contract* (3), is sound law.

Burrows in reply.

Cur. adv. vult.

1918. July 11. SARGANT J. The facts in this case are, and are admitted to be, substantially indistinguishable from those in *In re Cornwallis-West and Munro's Contract.* (2) But nevertheless Mr. Burrows has asked me to decide the exact contrary of that case. While that case was unexplained there were obvious objections to it. But, as explained shortly afterwards in *In re Lord Wimborne and Browne's Contract* (3), it has stood for some fourteen or fifteen years without, so far as I know, any expression of judicial dissatisfaction, and has found its way into all the ordinary text-books, though there has been criticism by one or two text-writers, and notably by Mr. Cyprian Williams in his work on Vendor and Purchaser. In these circumstances, even if I were individually disposed to disagree with the decision in *In re Cornwallis-West and Munro's Contract* (2), I should hardly feel at liberty to make the order asked, but should leave it to a higher tribunal to overrule the decision if thought fit.

But, after very careful consideration, I think that the decision as explained in *In re Lord Wimborne and Browne's Contract* (4) was right, and that for the reason stated on the authority of Farwell J. at the top of p. 542 of the report in the Law Reports. There the present Master of the Rolls says this: "I have the authority of Farwell J. for stating

(1) (1884) 28 Ch. D. 93.
(2) [1903] 2 Ch. 150.
(3) [1904] 1 Ch. 537.
(4) Ibid. 542.

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that the true explanation of that case "—that is, *In re Cornwallis-West and Munro's Contract* (1)—" is that as the old life estate created by the will had been restored, the tenant for life could not sell and confer a good title under the resettlement alone, as he proposed to do; and as there were no trustees for the purposes of the Settled Land Act of the settlement created by the will, the tenant for life could not as matters then stood sell under the will alone."

This reasoning I venture to expand and apply to the present case as follows. Here, as in *In re Cornwallis-West and Munro's Contract* (1) and *In re Wright's Trustees and Marshall* (2), the subject-matter comprised in the resettlement is different from that comprised in the prior settlement, inasmuch as in the course of the process of resettlement the estate settled became subject to the family charges under the earlier settlement. And here too, as in those cases, the life estate under the prior settlement has been expressly restored in order that the powers annexed to that life estate may be kept alive, and may, in the language of the resettlement here, have the same "overreaching" effect as if the resettlement had not been executed. The subsisting life estate of the applicant is, in short, the old life estate under the earlier settlement and in the larger or less incumbered interest which is the subject-matter of that settlement. It seems to me unimportant that an annual sum is provided for the eldest son out of the old life interest. This feature was present in *In re Wright's Trustees and Marshall* (2), and did not affect the decision. It was, of course, competent to the tenant for life to provide such an interest out of his existing life estate quite apart from the inclusion of that life estate in the resettlement. It might, for instance, have been done though in all other respects the resettlement were a settlement only of the remainder expectant on the termination of the existing life estate. Now this being so, how is it possible to hold that the applicant has at the same time both his continuing life interest in the larger subject-matter of the earlier settlement and a second present life estate in the smaller or more incumbered interest which is

(1) [1903] 2 Ch. 150. (2) 28 Ch. D. 93.

the subject-matter of the resettlement? But, unless this is the case, he is not in the position of a tenant for life as regards that smaller subject-matter, and has no power of sale over it. He has never got into the position which was occupied by the vendor in *In re Mundy and Roper's Contract* (1) of being the tenant for life of the smaller subject-matter settled by the resettlement, and so capable, had he chosen, of making title under that resettlement with the concurrence of the owners of the charge having priority to that resettlement. See the judgment of Chitty L.J. at p. 295 of the report in the Law Reports.

It is true that, when on a resettlement the life interest under the earlier settlement is not preserved, the tenant for life may be able to sell either under the earlier settlement or (with the consent of intermediate incumbrancers) under the latter settlement. But this is because his earlier power over the larger subject-matter is preserved as being statutorily indestructible, while his later power over the smaller subject-matter arises from his being tenant for life thereof under the resettlement. It by no means follows that there is such a double power of sale where the resettlement preserves the life interest under the prior settlement. For in such a case, while his old powers of sale and so on of course remain unaffected, no fresh statutory powers come to him under the resettlement, because he does not become tenant for life under that resettlement of the subject-matter comprised in it.

The particular terms of the name and arms clause and of some other clauses of the resettlement were referred to on each side as indicating that the applicant was or was not intended to be made an immediate tenant for life within the meaning of the resettlement and of the subject-matter comprised therein. It seems to me that the language is somewhat inconclusive and ambiguous, and I do not see how it can prevail so as to override or qualify the exceptionally clear preceding words by which the applicant had his old life estate restored, or so as to create a simultaneous life estate in the smaller subject-matter of the resettlement.

(1) [1899] 1 Ch. 275.

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There will be no order on the application except that the costs of all parties, as between solicitor and client, be raised out of the capital moneys subject to the settlement.

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Colonel Constable appealed. The appeal came on for hearing on Oct. 15, 1918.

Tomlin K.C. and *L. F. Potts* for the appellant.

Sargant J. has held that the appellant cannot exercise the extended powers given him by the resettlement of 1912, although he may exercise the statutory powers under the will.

It is submitted that the restoration by the resettlement of his original life estate under the will is a conveyancer's device for keeping alive those powers which he originally had by virtue of his original interest in the estate. By the statute the statutory powers remain although he has parted with the estate.

The result of the judgment in the court below is that there is no person at present who can exercise the powers under the Settled Land Act or by the resettlement conferred on a tenant for life under the resettlement.

The question whether the appellant is tenant for life of the resettlement is one of construction of the Settled Land Act, and of seeing whether his position answers the definition in that Act. By s. 2, sub-s. 1, a "settlement" is defined as "Any deed, will, agreement for a settlement or other agreement . . . , or other instrument, or any number of instruments . . . . under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession." It cannot be doubted that the document of 1912 is a settlement within that definition.

By s. 2, sub-s. 5: "The person who is for the time being, under a settlement, beneficially entitled to possession of settled land for his life, is for purposes of this Act the tenant for life of that land, and the tenant for

life under that settlement." The only way in which the appellant can establish his right to the rents and profits of the estate is by producing the resettlement of October, 1912. For the purposes of this sub-section he is the person who is beneficially entitled to possession of the settled land. It is by the resettlement of 1912 alone that he is so entitled.

By s. 2, sub-s. 3: "Land, and any estate or interest therein, which is the subject of a settlement, is for purposes of this Act settled land, and is, in relation to the settlement, referred to in this Act as the settled land." Here the subject of the resettlement is an equity of redemption—namely, the settled land subject to the prior family charges. If it had rested there the matter would be clear, and the appellant could under the resettlement of 1912 have exercised the powers subject to the family charges. It is only by that resettlement that he is made tenant for life, whether it be in restoration of his previous estate or not. The fact that under the will the interest of the appellant has priority over the jointure rent charge does not prevent him from being tenant for life under the resettlement.

The object of the restoration of the original life estate was not to deprive the appellant of his position as tenant for life under the resettlement, but to keep alive the original powers under the will.

As to the construction of the Act, Chitty L.J., in *In re Mundy and Roper's Contract* (1), said: "The broad policy on which the Act is founded is laid down by the House of Lords: *Lord Henry Bruce* v. *Marquis of Ailesbury.* (2) The object is to render land a marketable article, notwithstanding the settlement." The construction which Sargant J. has put on the Act tends the other way. The appellant's right to possession of the settled land rests to-day on the resettlement of 1912. He is no longer tenant for life under the will. It is only by a metaphysical conception that it can be said that he is in of his old estate. The estate may be similar.

(1) [1899] 1 Ch. 275, 288. (2) [1892] A. C. 356.

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In *In re Cornwallis-West and Munro's Contract* (1) it seems to have been assumed that the tenant for life could sell under the resettlement subject to the jointure and incumbrances. The real objection to the title there was that the tenant for life could not make a title under the resettlement because he was not in a position to compel the jointress to consent. The judge there decided that except under the will or the compound settlement there was no way in which the tenant for life could override the jointure. If the interpretation to be put on the decision is that the tenant for life was not entitled to exercise the powers under the resettlement then it is submitted that the decision was wrong, and should be overruled.

[SWINFEN EADY M.R. Was the argument for the vendor there your argument here ?]

Yes, substantially. The appellant can make a title to what is included in the resettlement and to nothing else. It is not contended that he could make a good title to a purchaser under the resettlement because he cannot compel the jointress to concur. It would be otherwise in the case of a mortgage because he could compel the mortgagee to come in. The ground on which this proceeds is that a vendor cannot require the purchaser to enter into a new contract : *In re Bryant and Barningham's Contract.* (2)

In *In re Cornwallis-West and Munro's Contract* (1) the tenant for life could not make a good title under the will, because there were no trustees of it, nor under the compound settlement because there were no trustees for the purposes of the Settled Land Act, nor under the resettlement because he could not compel the jointress to concur. See Williams on Vendor and Purchaser, 2nd ed., pp. 312, 313, 315. It is undoubted that the tenant for life has all the statutory powers, whether he has parted with his interest or not : Settled Land Act, 1882, s. 50 (1.) (2.).

It is not necessary, however, for the appellant to say whether with or without the concurrence of the jointress and portioners he could make a title to the property. The question is whether

(1) [1903] 2 Ch. 150. (2) (1890) 44 Ch. D. 218.

he is tenant for life under the resettlement. If he is, there are extended powers which he can exercise except as against the jointress and portioners. It is only by virtue of the resettlement that it can be ascertained what his interest is.

Sargant J. has not sufficiently borne in mind that the question here is one of construction of the statute. It is impossible to say that the appellant is not, under the circumstances, tenant for life of the resettlement.

Our argument does not involve overruling *In re Cornwallis-West and Munro's Contract.* (1) All that that case decided was that the tenant for life could not make a good title. If it is to be treated as deciding that the tenant for life was not tenant for life under the resettlement it is inconsistent with *In re Mundy and Roper's Contract* (2), and should not be upheld.

It is submitted therefore that the appellant is tenant for life under the resettlement, and has the powers given by the Act and the extended powers given by the resettlement.

In *In re Mundy and Roper's Contract* (2) it was decided that there might be a more comprehensive and a less comprehensive settlement subsisting at one and the same time, and that the same person might be the tenant for life of both. Sargant J. in this case has held the opposite.

It is clear that the present case comes within the exact words of s. 2, sub-s. 1 of the Settled Land Act, which includes a resettlement. Here the settled land is the land subject to the jointure and the portions.

By the Inheritance Act, 1833 (3 & 4 Will. 4, c. 106), s. 3: "When any land shall have been limited, by any assurance executed after the said thirty-first day of December, one thousand eight hundred and thirty-three, to the person or to the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser, by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate or part thereof."

(1) [1903] 2 Ch. 150.

(2) [1899] 1 Ch. 275.

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[He also referred to Davidson's Precedents, 3rd ed., vol. iii., Part 2, p. 1039.]

G. R. Northcote for the trustees of the resettlement, one of whom was also a remainderman.

It is difficult to say that under s. 2 the resettlement was not an instrument under which the land stood "limited to, or in trust for, any persons by way of succession." I do not deny that the appellant is under sub-s. 5 of s. 2 beneficially entitled for life. But the question is: under what settlement is he so entitled? It is submitted that he cannot have a larger life estate under the will and a more restricted estate in a more restricted subject-matter under the resettlement.

In re Wright's Trustees and Marshall (1) is a clear decision that the old life estate remains. The original estates are only affected so far as is necessary to carry out the intention of the parties: Davidson's Precedents, 3rd ed., vol. iii., p. 595.

In *In re Cornwallis-West and Munro's Contract* (2) Farwell J. said: "It is sufficient for me to say that, in my opinion, the old estate in this case has been restored." If that is right a tenant for life can only be in possession of one life estate under one instrument at the same time. The policy of the Act is in no way interfered with by maintaining that decision.

[EVE J. Suppose there were no words of restoration of the life estate?]

Then the tenant for life could sell under the first deed because the statutory powers could not be lost.

It is submitted that the appellant here is tenant for life under the will, and that excludes him from having another life estate under the resettlement.

[EVE J. Supposing there were a sale under the resettlement and a subsequent exercise of the power to raise portions.]

The portion would be charged on the purchase money or on any unsold part of the estate. *In re Lord Wimborne and Browne's Contract* (3) must be read into *In re Cornwallis-West and Munro's Contract.* (2) It is, of course, open to

(1) 28 Ch. D. 93.
(2) [1903] 2 Ch. 150, 154.
(3) [1904] 1 Ch. 537.

this Court to overrule the latter case and *In re Wright's Trustees and Marshall.* (1)

The question as to the extended powers depends upon the construction of the deed. Colonel Constable is not in a position to exercise those powers. If the question upon the Settled Land Act be decided against him it follows that he cannot exercise the extended powers.

Potts, in reply.

As to the conflict between the provisions of the settlement and the provisions of the Settled Land Act, 1882, see s. 56 of that Act. Sect. 57 enables the settlors to create additional or larger powers. They have done so, and the extended powers are exercisable in like manner as if they were conferred by the Act.

As to the power to charge portions Colonel Constable can release it so far as it has not been exercised: *In re Radcliffe.* (2)

So far as it has been exercised the portioners can release.

As to the restoration of the old life estate, at the date of the disentailing deed the position was this: Colonel Constable was tenant for life and Captain Constable tenant in tail in remainder, and there were certain charges in existence. The two were in a position to deal with the estate as they pleased subject to the charges. By the resettlement Colonel Constable's life estate under the will was conveyed to the grantee to uses who then had seisin in fee. That life estate is gone for ever, and cannot be revived. A different life estate could be, and was, created and given to Colonel Constable: 1 Key and Elphinstone's Precedents, 8th ed., 497.

[EVE J. The new life estate could not take priority over pre-existing charges.]

See Davidson's Precedents, 3rd ed., Part 1, vol. iii., pp. 594, 596. The tenant for life selling under the will or under the compound settlement can do so free from the portions, but if he sells under the resettlement he can only do so subject to the existing charges. So far as *In re Cornwallis-West and Munro's Contract* (3) is against that it is contradictory to *In re Mundy*

(1) 28 Ch. D. 93. (2) [1891] 2 Ch. 662.
(3) [1903] 2 Ch. 150.

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and Roper's Contract (1), and is erroneous. Colonel Constable can sell as tenant for life under the resettlement subject to the charges. *Cur. adv. vult.*

Dec. 4. SWINFEN EADY M.R. delivered the judgment of the Court (Swinfen Eady M.R., Duke L.J. and Eve J.) as follows: The applicant, Colonel W. G. Raleigh Chichester-Constable, by the originating summons claims to have it determined that he is tenant for life under a settlement dated October 22, 1912, within the meaning of the Settled Land Acts, 1882 to 1890, and that he is entitled as such to exercise (subject to the incumbrances having priority of the settlement) (*a*) all the statutory powers conferred by the said Acts upon a tenant for life; and (*b*) all the extended or enlarged powers conferred by the said settlement upon the tenant for life for the time being of the settlement, within the meaning of the said Acts.

Upon the summons coming before Mr. Justice Sargant he did not make any order upon it, considering himself bound by the decision in *In re Cornwallis-West and Munro's Contract.* (2) The applicant now appeals.

[The Master of the Rolls then stated the material facts and the provisions of the deeds substantially as above set out, and continued]:

The appellant now urges that the judgment of Mr. Justice Sargant was erroneous, and he asks for an order in the terms of his summons. He contends that, notwithstanding the language of the resettlement, the estate of which he is now tenant for life is an estate taken under the resettlement in the property thereby settled, and accordingly that, as tenant for life of such property, he can exercise the extended powers conferred by the resettlement.

It is not in dispute that he possesses the statutory powers of a tenant for life under the will. He took an estate for life thereunder, and accordingly still has the powers of a tenant for life, even if he has parted with his life estate: Settled Land Act, 1882, s. 50 (1.) (2.).

(1) [1899] 1 Ch. 275. (2) [1903] 2 Ch. 150.

The applicant, however, desires to exercise the more extended or enlarged powers conferred by the resettlement of 1912, over, or in relation to, the estates thereby settled upon the person or persons who should for the time being together constitute or be the tenant for life, or have the powers of a tenant for life of that settlement within the meaning of the Settled Land Acts, 1882 to 1890. It is conceded that these powers only extend to the estates or interests thereby settled, and that, as regards property settled by the said will or which has since been settled to the like uses, the estates or interests comprised in the resettlement are subject to the jointure rent-charge in favour of Colonel Constable's widow and to the portions for his younger children and to the other incumbrances in the resettlement mentioned. In respect of the estates or interests so settled, however—that is to say, the property subject to the charges—the applicant insists that he is a tenant for life under that resettlement. It cannot be disputed that under, or by virtue of, the resettlement, some estate or interest in land stands for the time being limited to, or in trust for, some persons by way of succession, so that the instrument is a settlement for the purposes of the Settled Land Acts: Settled Land Act, 1882, s. 2 (1.). It has been held, however, in the court below that the applicant is not a tenant for life under that settlement, because his life estate is thereby expressed to be in restoration and by way of confirmation of the life estate or estates limited to him by the will and the settlement of 1871. The learned judge said: "How is it possible to hold that the applicant has at the same time both his continuing life interest in the larger subject-matter of the earlier settlement and a second present life estate in the smaller or more incumbered interest which is the subject-matter of the resettlement? But, unless this is the case, he is not in the position of a tenant for life as regards that smaller subject-matter, and has no power of sale over it." In my opinion, however, this argument is met by saying: How is it possible to hold that the applicant has retained a continuing life estate in the larger subject-matter, when

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by the terms of the resettlement he has granted and conveyed it? If the legal effect of the resettlement is to convey his old life estate, and to give him in lieu of it another life estate under that instrument (as in our opinion it is) (see 3 & 4 Will. 4, c. 106, s. 3, and Davidson, 3rd ed., vol. iii., p. 596), this legal effect is not prevented by saying that the life estate under the resettlement is in restoration and by way of confirmation of his old life estate.

Before the case of *Alexander* v. *Mills* (1) an opinion prevailed that where a tenant for life parted absolutely with his interest, any power of sale given to him, or made exercisable at his request and by his direction, was thereby destroyed. The argument was that the power being appendant to the estate was extinguished by the entire alienation of the estate. This was Lord St. Leonards' opinion: Sugden on Powers, 8th ed. (1861), p. 57. The Court of Appeal, however, in *Alexander* v. *Mills* (1) determined the contrary.

The object of inserting the words "in restoration and by way of confirmation" of a previous life estate, or words to that effect, was to keep alive the powers incident to the estate and conferred on the tenant for life by the original instrument. But their true operative effect was that they showed an intention of keeping alive the old powers, and they had this effect, and the old powers remained exercisable according to the intention of the parties, even though the old life estate was not in fact thereby restored or kept alive. *Alexander* v. *Mills* (1) showed that it was unnecessary to restore the life estate to keep alive the powers. In deciding *In re Cornwallis-West and Munro's Contract* (2) Mr. Justice Farwell purported to be following the decision of Mr. Justice Pearson in *Wright's Trustees and Marshall.* (3) He said so in terms. The decision of Mr. Justice Pearson in *Wright's Trustees and Marshall* (3) was that, notwithstanding the resettlement, the second tenant for life named in the will still had the power of requesting a sale. Although the judge relied strongly on the intention

(1) L. R. 6 Ch. 124. (2) [1903] 2 Ch. 150.
(3) 28 Ch. D. 93.

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of the parties, he came to the conclusion that John, the second tenant for life, had the life estate which he originally had under the will. He said that the point which he had to determine was the very point in substance raised in *Harrison* v. *Round.* (1) But in that case, by the recovery deed the father and son conveyed to the tenant to the præcipe during the joint lives of the father and the person to whom the conveyance was made so as to leave the father a reversion of his life estate, and there was also what was called the £100,000 clause for the purpose of avoiding the conveyance. The effect of this was to annex a condition to the estate so granted, on the non-performance of which that estate was to become void. The money was, of course, never paid. The estate of the bargainee or releasee was good until the contemplated forfeiture occurred, and meanwhile the recovery was suffered, and its validity was held to be unaffected by the subsequent forfeiture of the estate vested in the tenant to the præcipe, although that forfeiture was allowed to operate so as to restore to the tenant for life in possession his old life estate (2 Vaizey on Settlements, p. 1506). This case fell within the old common law rule that if an estate be granted upon condition, and the grantor re-enter for condition broken, he is in and seised of his former estate. "And it is called an estate upon condition, because that the estate of the feoffee is defeasible if the condition be not performed," etc.: Littleton, s. 325. "Regularly it is true that he that entereth for a condition broken shall be seised in his first estate, or of that estate which he had at the time of the estate made upon condition": Co. Litt. 202*a*.

The case of *Harrison* v. *Round* (1) was not, therefore, any authority for the opinion of Mr. Justice Pearson in *In re Wright Trustees and Marshall* (2) that John, the second son, still possessed the life estate which he had under the will, nor for Mr. Justice Farwell holding in *In re Cornwallis-West and Munro's Contract* (3) that the old life estate had really and in fact been restored.

(1) (1852) 2 D. M. & G. 190. (2) 28 Ch. D. 93.
(3) [1903] 2 Ch. 150.

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In *In re Mundy and Roper's Contract* (1) the Master of the Rolls and Lord Justice Chitty pointed out that under the resettlement there (1889) the vendor as tenant for life under that resettlement could have sold the land and discharged it from the limitations of the resettlement, but of course subject to the jointure and portions of his wife and younger children which upon such a sale would stand in priority to that settlement, and that the trustees thereby appointed could have given a valid discharge for such purchase money. That, in our judgment, is the position in the present case. It is true that in that case the life estate of the vendor had not in terms been limited to him in restoration of his old life estate, but the Court said: "The object of this restoration is well known. It is to keep alive the old powers annexed to the life estate." The clause is sufficient to show an intention of keeping alive these powers although ineffectual to restore the same life estate when the operative words of the deed are sufficient to pass it.

There is a passage in Sugden on Powers, 8th ed., p. 71, in which the learned author says: "19. Although the whole estate of the donee of the power is conveyed by him, yet if it is by way of resettlement, and the prior uses are relimited, and the prior powers of sale and exchange saved and confirmed, those powers may still be exercised, although present powers of sale and exchange are reserved by the new settlement to different persons. The old use is restored, the intention is expressed, and no incumbrance is created to prevent the exercise of the old powers." The authorities cited, however, do not support the proposition in the text that the old use is restored where the whole estate of the donee of the power is conveyed.

It may be that the learned author was anxious to find some ground upon which the powers of the previous instrument could be held to remain in force after a resettlement; and as his opinion was that an absolute alienation of his estate by a tenant for life destroyed his powers, the best method of preventing such destruction was to uphold the view that

(1) [1899] 1 Ch. 275, 294, 295.

the old life estate remained, and that the old use was restored where the conveyance was by way of resettlement and the prior uses relimited.

In *In re Cornwallis-West and Munro's Contract* (1) the vendor was tenant for life under the resettlement, and there were trustees of the resettlement, and the incumbrancers were willing to join in the conveyance to release their interests. Treating the decision in that case as determining that the vendor was tenant for life under the will and not under the resettlement, and that he could not, as tenant for life under the resettlement, with the concurrence of the jointress and mortgagees joining to release their interests, convey the property in fee to a purchaser, it is, in our opinion, erroneous.

The appellant is entitled to a declaration that he is tenant for life under the resettlement of the property thereby settled, and as such can exercise over that property the powers by the Settled Land Acts, 1882 to 1890, and by the resettlement conferred on a person for the time being tenant for life within the meaning of the said Acts.

Solicitors for all parties: *Collyer-Bristow, Curtis, Booth, Birks & Langley, for Stamp, Jackson & Birks, Hull.*

(1) [1903] 2 Ch. 150.

G. A. S.

P. O. LAWRENCE J.

1918

Nov. 19.

In re NORTH EASTERN INSURANCE COMPANY, LIMITED.

[No. 0084 of 1914.]

Company—Articles—Quorum of Directors—Interested Director—One Meeting, Two Resolutions—Resolution reducing Quorum—Validity.

The articles of association of the company provided that no director should be disqualified from contracting with the company, but that no director should vote in respect of any such contract; and further provided that the directors might determine the quorum necessary for the transaction of business, and that, until otherwise determined, three should be a quorum. At a board meeting on June 16, 1913, at which the four directors of the company, including Y. and D. were present, after referring to cash advances made to the company by Y. and D. in consideration of receiving the debentures thereinafter mentioned, a resolution was passed for the issue of a debenture for 351*l.* to Y., who did not act or vote in relation to this resolution; and a second resolution for the issue of a debenture for 950*l.* to D., who did not act or vote in relation to this resolution. Each debenture provided that it should rank equally along with the other as a floating charge, and contained a condition that, after the principal money became payable, the holder and the holder of the other debenture might, by writing under their hands, appoint a receiver, the moneys to be received by him to be applied in satisfaction, pari passu, of the two debentures:—

Held, that the issue of the two debentures formed part of one transaction in which both Y. and D. were equally interested, and that the resolutions were invalid for want of a disinterested quorum.

In re Greymouth Point Elizabeth Ry. & Coal Co. [1904] 1 Ch. 32 followed.

At a board meeting on September 4, 1913, at which D. was not present, a resolution was passed for the issue of a debenture for 2000*l.* to D. as security for all moneys due, or to become due, from the company to D. and Y. not exceeding that amount. There was no entry in the minute book that Y. did not act or vote in relation to this resolution, but evidence was adduced to show that at the same meeting a previous resolution was passed that the quorum of directors should be reduced to two, so as to enable the resolution for the issue of the debenture to be passed by the two other directors present:—

Held, that the resolution for the issue of the debenture was invalid for want of a disinterested quorum, and that even assuming that a resolution for the reduction of the quorum was, in fact, passed, such resolution was itself invalid, because it was not passed in the interest of the company, but only for the purpose of enabling Y. to obtain an interest in the company's property.

SUMMONS.

The articles of association of the company provided:—

"116. No director shall be disqualified by his office from contracting with the company either as vendor purchaser or otherwise nor shall any such contract or arrangement entered into by or on behalf of the company with any company or partnership in which any director so contracting or being such a member or so interested, be liable to account to the company for any profit realized by any such contract or arrangement by reason only of such director holding that office or the fiduciary relation thereby established, but no director shall vote in respect of any such contract or arrangement and the nature of his interest where it does not appear on the face of the contract shall be disclosed by him at the meeting of directors at which the contract or arrangement is determined on, if his interest then exists, or in any other case at the first meeting of the directors after the acquisition of his interest."

"125. The directors or any committee of directors may meet together for the dispatch of business, adjourn and otherwise regulate their meetings as they think fit, and determine the quorum necessary for the transaction of business. Until otherwise determined three shall be a quorum. Questions arising at any meeting shall be decided by a majority of votes. In case of an equality of votes the chairman shall have a second or casting vote."

The four directors of the company were Messrs. Young, Dobbie, Cooper, and Lishman.

At a board meeting held on June 16, 1913, in which Mr. Young was in the chair and Messrs. Dobbie, Cooper, and Lishman were present, it was reported (according to the entry in the minute book) that Mr. Young and Mr. Dobbie had, with the approval of the directors, made certain cash advances in consideration of receiving the debentures after mentioned, they also receiving, in further security, a transfer of 5000 shares held by the company in another company therein mentioned, and in further of consideration of their making such advances they receiving an option for a year from the date thereof, to be exercised by either, to acquire these shares absolutely at a price, failing agreement, to be

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fixed by an arbiter mutually chosen. The directors agreed to these terms. The meeting resolved, Mr. Cooper proposing and Mr. Lishman seconding, that in order to secure the repayment of sums amounting to 351*l.* 15*s.* due by the company, a debenture for 351*l.* 15*s.* be issued to Mr. Young over the company's real and personal property, present and future, and the undertaking, goodwill, and business of the company, and all its uncalled capital for the time being, subject to the conditions contained therein. . . . .

Mr. Young did not act or vote in relation to the said resolution.

It was further resolved, Mr. Cooper proposing and Mr. Lishman seconding, that in order to secure the repayment of sums amounting to 950*l.* due by the company, a debenture for 950*l.* be issued to Mr. Dobbie on similar terms and conditions.

Mr. Dobbie did not act or vote in relation to the said resolution.

The minute further stated that a transfer of the above-mentioned 5000 shares in favour of Mr. Young was also executed by the company in terms of the above arrangement.

By the debenture issued to Mr. Young the company bound itself to pay 351*l.* 15*s.* to Mr. Young or other the registered holder thereof on October 1, 1913, with interest at the rate of 6*l.* per cent. per annum, and charged with such payments all its real and personal property, including its uncalled capital, and stated that that debenture should rank equally along with a debenture for 950*l.* in favour of Mr. Dobbie as a first charge on the premises thereinbefore charged, and that that debenture and the said other debenture were, or would be, issued and held subject to the conditions endorsed on that debenture and the said other debenture. Condition 1 provided that the charge created by that debenture and the debenture for 950*l.* in favour of Mr. Dobbie should be a floating security. Condition 5 provided that the principal moneys thereby secured should become forthwith payable in the event, inter alia, of the company going into liquidation. Condition 9 provided that when, and so soon as, the principal

moneys thereby secured should have become immediately payable, the holder of that debenture and Mr. Dobbie might, by writing under their hand, appoint any person to be receiver of the premises charged by that debenture, and that the said receiver should have all the powers conferred by the Conveyancing and Law of Property Act, 1881, and should, in addition, have power to carry on the business of the company and to apply the net profits (1.) in paying his remuneration at such rate as shall be appointed by the holder of that debenture and Mr. Dobbie; (2.) in paying any prior incumbrances; (3.) in paying the interest upon that debenture and the debenture in favour of Mr. Dobbie; and (4.) in paying the principal moneys secured by that debenture and the said debenture in favour of Mr. Dobbie.

The debenture for 900*l.* issued to Mr. Dobbie was in corresponding terms.

At a board meeting of directors held on September 4, 1913, at which Mr. Young was in the chair and Messrs. Cooper and Lishman were present, it was reported (according to the entry in the minute book) that certain judgment creditors had agreed to delay their judgment against the company conditionally upon substantial personal guarantees being obtained for payment within not later than two months, and that Mr. Young and Mr. Dobbie had been asked to guarantee the debt. The meeting considered that, in the present financial position of the company, there was no probability of any outside guarantee being obtained on any terms, and the directors, other than Mr. Young, expressed their strong desire that in order to further assist the company at this time Mr. Young and Mr. Dobbie should consent to give the guarantee required, in consideration of a fee or commission of one hundred guineas each in respect of the personal responsibility and risk which would be undertaken by them.

It was explained that unless the required guarantee was delivered immediately the judgment creditors would petition at once for a winding-up order.

Mr. Young reluctantly agreed to join with Mr. Dobbie

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in granting the required guarantee on the terms offered, and to communicate with Mr. Dobbie with a view of obtaining his consent also on the same terms.

It was reported that, at the request of the individual directors, Mr. Young and Mr. Dobbie had already agreed to give a guarantee to certain other creditors of the company to prevent further proceedings at their instance against the company, and the meeting resolved to execute a debenture for the sum of 2000*l.* in favour of Mr. Dobbie in security for all sums due, or to become due, to him and to Mr. Young not exceeding in all 2000*l.*

The said debenture was accordingly executed at the meeting, and the secretary was instructed to deliver the same to Mr. Dobbie for registration.

On March 10, 1914, the company was ordered to be wound up compulsorily, and by an order dated May 14, 1918, Astbury J. declared that, subject to any question as to whether there was an effective quorum of directors present at the meetings of the board which authorized the issue of the three debentures, the same were validly issued and constituted charges upon the uncalled capital of the company; and on June 4, 1918, the liquidator took out the present summons for directions as to whether the resolutions by which the three debentures were issued were validly passed.

As regards the debenture for 2000*l.*, Mr. Young filed an affidavit, sworn on June 22, 1918, in which he stated: "I was present at a meeting of directors of the above-named company on September 4, 1913. Mr. Cooper and Mr. Lishman, two other directors, were also present when it was proposed to execute a debenture for 2000*l.* in favour of Mr. Dobbie. It was pointed out that, without including myself, there would not be a quorum of three directors, but that the quorum could be reduced to two; but the secretary suggested that the position might also be met by electing him a director, and so make the number of directors present three, excluding myself. This course was not approved by the directors present, and it was eventually proposed by Mr. Cooper and seconded by Mr. Lishman, and resolved

that the quorum be reduced to two; but it appears that it was not recorded in the minutes of the meeting held on that day. Subsequently the resolution for granting and sealing the debenture in favour of Mr. Dobbie was passed by the other two directors present, namely, Mr. Cooper and Mr. Lishman, and I did not vote thereon." Mr. Cooper filed a similar affidavit to the same effect.

Douglas Hogg K.C. and *Cecil W. Turner* for the liquidator.

None of these resolutions were validly passed. Messrs. Young and Dobbie, as interested directors, were unable to vote in favour of the subject-matter of the arrangement come to at the board meeting of June 16, and there was, therefore, no quorum necessary for the transaction of the business: *In re Greymouth Point Elizabeth Ry. and Coal Co.* (1), and the fact that two resolutions were passed makes no difference. The true effect of the arrangement come to by all four directors was that the two debentures constituting one security should be issued to Messrs. Young and Dobbie, and after that had been agreed upon the two separate resolutions were mere form. The substance and operative part of the transaction lay in the agreement to issue the two debentures. The objection to the validity of these resolutions is not a technical one, but rests on the general principle of equity that an agent cannot be allowed to put himself into a position in which his interest and his duty will be in conflict: *Parker* v. *McKenna.* (2)

The resolution under which the debenture for 2000*l.*, in which Mr. Young was jointly interested with Mr. Dobbie, was issued at the board meeting on September 4, was equally invalid. On the face of it there was no sufficient quorum of directors without counting the vote of Mr. Young, who was himself an interested party; and, even if the improbable story of the passing of a previous resolution at the same meeting for the reduction of the quorum to two were to be accepted, it would carry the matter no further, the alteration

(1) [1904] 1 Ch. 32. (2) (1874) L. R. 10 Ch. 96, 118.

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being made for the sole purpose of enabling the debenture to be issued to the interested director and not for the benefit of the company.

Whinney for the respondent Young. The two resolutions passed at the board meeting of June 16 were validly passed. It was competent for the board to split up the resolution into two resolutions. See per Farwell J. in *Young* v. *Naval, Military and Civil Service Co-operative Society of South Africa.* (1) The Court will not be astute to upset an honest transaction entered into by the directors for the benefit of the company. Each of the two directors had a distinct interest in his own security. The common power given to appoint a receiver in each debenture is in the nature of mere machinery for giving effect to the security.

As to the debenture for 2000*l.*, it was competent to the board to alter the quorum pro hac vice, and no previous notice specifying the business was necessary : *La Compagnie de Mayville* v. *Whitley.* (2) It is true that there is no entry in the minute book of the passing of such a resolution, but the evidence is admissible to show the real facts : *In re Fireproof Doors Co.* (3); *In re Pyle Works* (No. 2) (4); and I ask your lordship to accept the evidence on this point of Mr. Cooper and Mr. Young, neither of whom has been cross-examined.

Howard Wright for the respondent Dobbie. Article 116 is an enabling article subject to two added conditions, which are in the nature of disenfranchising conditions, and must be strictly construed. There is no question here that each of the two directors disclosed his interest, and did not vote in respect of the debenture issued to himself. That was a sufficient compliance with the disenfranchising part of the article. There was no necessity to hold two meetings for the purpose.

Douglas Hogg K.C. in reply.

P. O. LAWRENCE J. This is a summons issued by the

(1) [1905] 1 K. B. 687, 696.
(2) [1896] 1 Ch. 788.
(3) [1916] 2 Ch. 142.
(4) [1891] 1 Ch. 173, 184.

liquidator to determine the validity of three debentures issued by the company. The first two debentures were issued in pursuance of resolutions passed at a Board Meeting held on June 16, 1913; and as their validity depends on the same considerations they can be conveniently dealt with together. The question which to my mind arises as to these two debentures is whether they both form part of one transaction in which the directors to whom they were issued were jointly interested, or whether the issue of each debenture can be said to form an independent transaction in which the director immediately concerned was solely interested so as to enable each director immediately concerned to vote on the issue of the debenture to the other director. Now, the facts leading up to the issue of these debentures are set out in the minute of June 16, 1913. [His Lordship referred to the minute of that date, and continued:] Having stated the arrangement in pursuance of which these debentures were to be issued, it occurred to the meeting that there might be an objection to the resolution giving effect to the transaction if Mr. Young were to vote in favour of the issue of the 351*l.* debenture and Mr. Dobbie were to vote in favour of the issue of the 950*l.* debenture; so what was done at the meeting was, first, to state the arrangement, and then to sever the two resolutions, the director immediately interested in each case not voting.

The question is whether the resolutions so passed are valid resolutions. In my judgment they are not. The real point is whether the issue of the debentures ought to be regarded as part of one entire transaction in which both directors were jointly interested. I think it ought to be so regarded. If either of the resolutions in question had not been passed, or if the transfer of shares had not been executed, the transaction agreed upon would not have been carried out. In my judgment, therefore, Mr. Young was interested in the issue of the debenture to Mr. Dobbie and Mr. Dobbie was interested in the issue of the debenture to Mr. Young. The real facts were that these two gentlemen had agreed to make advances to the company upon receiving certain debentures

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and shares as security, and they were both interested in seeing that the whole of the terms relating to the advances were carried out. In fact, the circumstances of the present case differ very little, if at all, from those in *In re Greymouth Point Elizabeth Ry. and Coal Co.* (1), and in my opinion the present case cannot be distinguished from that authority by reason merely of the severance of the two resolutions relating to the one transaction. Further it is obvious that the two debentures in question which were made to rank pari passu really constituted one security, the debenture issued to Mr. Dobbie referring to that issued to Mr. Young, and the debenture issued to Mr. Young referring to that issued to Mr. Dobbie, and it was impossible to realize the one without realizing the other. Moreover, it has not been suggested that the agreement to transfer the shares by way of further security was not an essential part of the transaction or that the two directors were not jointly interested in such transfer. In my judgment, therefore, the resolutions for issuing these two debentures are, for the reasons which I have stated, invalid.

The remaining question relates to the 2000*l.* debenture, which stands in this way. From the minute of the board meeting of September 4, 1913, it appears that Messrs. Young and Dobbie had been requested to give a guarantee under very urgent circumstances, which they had agreed to do upon having security given to them in the shape of a debenture for the sum of 2000*l.* in favour of Mr. Dobbie to secure not only the money payable under the joint guarantee, but also all sums of money due, or to become due, from the company to Mr. Dobbie and Mr. Young. At that meeting there were present Mr. Young in the chair, Mr. Cooper, and Mr. Lishman, being the minimum number of directors required under the articles to form a quorum. As Mr. Young was personally interested he could not vote in favour of a resolution to issue the 2000*l.* debenture; nevertheless I find a resolution recorded in the minute book passed apparently by the votes of the three directors present authorizing the execution of the 2000*l.* debenture. Now, when the validity of the debenture is

(1) [1904] 1 Ch. 32.

challenged, Mr. Cooper and Mr. Young make affidavits in which they state that at that meeting a resolution was first passed altering the quorum of directors from three to two in consequence of it having been brought to their attention that unless the quorum were thus reduced, the resolution as to the issue of the debenture would be invalid. I find it hard to believe that any such resolution to alter the quorum was in fact passed. [His Lordship discussed the evidence on this point, and continued :] I have given my view of the facts, and it is difficult for me to persuade myself that such a resolution was passed, but I will assume for one moment that such a resolution was actually passed ; in my judgment that carries the matter no further. In my opinion a resolution passed simply to alter a quorum for the purpose of enabling a resolution to be passed conferring an interest in the property of the company upon a director—for that, and no other purpose —is an attempt to do, indirectly, that which cannot be done directly. It is part of the same arrangement for the purpose of conferring an interest upon a director, and is, therefore, just as invalid in my view as the resolution conferring the interest itself would have been if the three directors had voted upon it. It is not suggested that the alteration of the quorum was one which was to apply generally for the future meetings of the board, or even for any subsequent resolution at the same meeting ; moreover, there is no trace in the contemporaneous or subsequent minutes of the quorum of three having ever been reduced, nor is it suggested that Mr. Dobbie had ever heard that there was any such alteration. It therefore comes to this, that at a board meeting at which an interest in the company's assets is intended to be conferred upon one of the directors a resolution is passed by means of the vote of that director whereby the quorum is altered for the sole purpose of enabling a single further resolution to be passed conferring an interest in the property of the company upon that director. In my opinion the vote of the interested director in favour of a resolution to alter the quorum for such a purpose really comes to the same thing as a vote by him in favour of the resolution for conferring the interest on himself. I come to

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the conclusion therefore that the issue of the 2000*l.* debenture also was invalid, and in the result I am of opinion that all three debentures were invalidly issued, and I make a declaration accordingly.

Solicitors for liquidator: *Stephenson, Harwood & Co.*

Solicitors for respondents: *Herbert Smith & Co.; Rochester Pusey & Co.*

A. C.

C. A.
1918
Dec. 3.

In re DELOITTE.

GRIFFITHS *v.* ALLBEURY.

[1918 D. 422.]

Will—Vesting—Gift at Twenty-one—Period of Vesting—Advancement out of vested or presumptive Shares—Class ascertained upon Eldest attaining Twenty-one.

Testatrix by her will bequeathed to her trustees the sum of 4000*l.* in trust to pay the income thereof to E. D. A. during her life, and after her decease in trust to hold the same for all the children equally or any the child if only one of the present or future marriage of E. A. who should whether living at her death or born afterwards attain the age of twenty-one, and the testatrix bequeathed the further sum of 3000*l.* without any intervening life interest in trust for all such the said children or child of the said E. A. in manner aforesaid, and who should, whether living at her death or born afterwards, attain the age of twenty-one, and she declared that it should be lawful for her trustees at their discretion to raise any part or parts not exceeding in the whole one-third of the presumptive or vested share of any such child of the said E. A. under the trusts thereby declared, and to apply the same for his or her advancement or benefit as her trustees should think fit. Both E. D. A. and E. A. were still living. E. A. was married and had had issue one child only—namely, W. A., who attained the age of twenty-one years in April, 1918:—

Held, that the words "presumptive or vested" in the advancement clause must be read as referring to the trust legacy of 4000*l.*, and the word "presumptive" as referring to the trust legacy of 3000*l.*, and that, so reading the clause, there was nothing on the face of the will to exclude the rule in *Andrews* v. *Partington* (1791) 3 Bro. C. C. 401.

Held, therefore, as regarded the legacy of 3000*l.*, that the class was closed as soon as W. A. attained twenty-one, and that he being the only child of E. A. was entitled to immediate payment of the 3000*l.*

Iredell v. *Iredell* (1858) 25 Beav. 485 distinguished; *Bateman* v. *Gray* (1868) L. R. 6 Eq. 215 doubted and not followed.

Decision of Sargant J. reversed.

APPEAL from a decision of Sargant J.

Mary Ann Deloitte by her will dated July 6, 1901, after appointing executors and trustees thereof and making certain pecuniary and specific bequests bequeathed to her trustees the sum of 4000*l.* in trust to pay the income thereof to Eliza Deloitte Allbeury, a niece of her late husband, during her life for her separate use, and so that she should not have power

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to dispose thereof by way of anticipation, and from and after her decease "in trust to hold the said sum of 4000*l.* for all the children equally or any the child if only one of the present or any future marriage of Edward Allbeury, a nephew of my late husband, who shall, whether living at my death, or born afterwards, attain the age of twenty-one"; and the testatrix bequeathed to her said trustees without any intervening life interest the further sum of 3000*l.* "in trust for all such the said children or child of the said Edward Allbeury in manner aforesaid, and who shall whether living at my death or born afterwards attain the age of twenty-one"; and she declared that "it shall be lawful for my trustees at their discretion to raise any part or parts not exceeding in the whole one-third of the presumptive or vested share of any such child of the said Edward Allbeury under the trusts hereby declared, and to apply the same for his or her advancement or benefit as my trustees shall think fit."

The testatrix died on January 9, 1904.

Subsequently to the date of the will Eliza Deloitte Allbeury married, and was now Mrs. E. D. Bonner.

Edward Allbeury, who was also living, was married, and had had issue one child only—namely, William Allbeury, who attained the age of twenty-one years on April 23, 1918.

Questions having arisen as to the construction of the will in regard to the bequests of the 4000*l.* and the 3000*l.* the trustees took out an originating summons against William Allbeury for the determination (inter alia) of the question whether the defendant W. Allbeury took a vested interest in the sum of 3000*l.*, or whether any child of Edward Allbeury who might be born thereafter and attain the age of twenty-one years would be entitled to participate in the bequest.

Sargant J. considering himself bound by *Iredell* v. *Iredell* (1) and *Bateman* v. *Gray* (2) held that the introduction of the advancement clause in the will of the testatrix showed an intention by her to exclude the rule in *Andrews* v. *Partington* (3), and that all the children of Edward Allbeury whenever born were entitled to participate in the sum of 3000*l.*

(1) 25 Beav. 485. (2) L. R. 6 Eq. 215.
(3) 3 Pro. C. C. 401.

The defendant William Allbeury appealed. The appeal was heard on December 3, 1918.

Owen Thompson for the appellant. It is submitted that the rule in *Andrews* v. *Partington* (1) applies, and that the appellant having attained twenty-one the class is closed, and he is entitled to be paid the 3000*l.* trust fund.

The rule is thus stated in Hawkins on Wills, 2nd ed., p. 100:— "Where there is a bequest of an aggregate fund to children as a class, and the share of each child is made payable on attaining a given age, or marriage, the period of distribution is the time when the first child becomes entitled to receive his share, and children coming into existence after that period are excluded." See also per Kekewich J. in *In re Powell* (2); and Theobald on Wills, 6th ed., p. 302; 7th ed., p. 308.

It is suggested that the rule does not apply by reason of the fact that there is a reference in the advancement clause to "vested" shares, but it is submitted that the word "vested" has reference to the bequest of the 4000*l.* which is subject to a life interest. Sargant J. felt himself bound by *Iredell* v. *Iredell* (3) and *Bateman* v. *Gray* (4) to hold that the rule did not apply.

Iredell v. *Iredell* (3) was a very special case. It there appeared that the intention of the testator as shown by the express words of the will was that the child should be advanced or maintained after he attained twenty-one, and it is difficult to see how effect could have been given to the maintenance clauses if the rule applied. In *Bateman* v. *Gray* (5) Romilly M.R. after holding in an unreasoned judgment that the rule applied, reversed himself on a further hearing of the case. (4) It is very unsatisfactorily reported, but it appears from the report on the second hearing that there was an intervening life interest to which the word "vested" might refer. The case is not mentioned in Hawkins on Wills. It is putting it much too broadly to say that because the will

(1) 3 Bro. C. C. 401.
(2) [1898] 1 Ch. 227, 230.
(3) 25 Beav. 485.
(4) L. R. 6 Eq. 215.
(5) (1861) 29 Beav. 447.

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contains a maintenance clause, whether or not there is an intervening life interest, the rule is thereby excluded.

In *In re Courtenay* (1), in which Kekewich J. held that the effect of the advancement clause in that case was to let in all the children, the power to advance did not arise until the death of the testator's sisters. In *Gimblett* v. *Purton* (2) Malins V.-C. held that the class was to be ascertained on the eldest child attaining twenty-one notwithstanding the advancement clause.

[SWINFEN EADY M.R. That was a case of an immediate gift with power to apply the presumptive share of the legatee towards his maintenance. The Vice-Chancellor took the point that there was no prior life estate.]

B. A. Hall for the trustees. I have to argue on behalf of possible unborn children who might participate. I do not question the rule in *Andrews* v. *Partington*. (3) The question is whether the testatrix has in this will expressed an intention on the face of her will that the rule should be excluded. *Iredell* v. *Iredell* (4) and *Bateman* v. *Gray* (5) were cases in which the testator had shown an intention that the rule should not apply by doing something which was inconsistent with it so applying. The rule is an artificial one, and often defeats the intention of the testator, and is never applied where it appears that the intention of the testator was to exclude it. Here the clause providing for advancement out of vested shares is inconsistent with the application of the rule. This clause is, it is submitted, applicable both to the bequest of the 4000*l.* and to the bequest of the 3000*l.* It is suggested that that clause should be read distributively. Even so the clause must apply to both sums.

[SWINFEN EADY M.R. How do you read the clause so as to make it necessarily apply to both?]

It is submitted that the clause must be read as applicable to all "the trusts hereby declared." The trustees are to be entitled to make an advance out of the share whilst presumptive as well as when vested.

(1) (1905) 74 L. J. (Ch.) 654.
(2) (1871) L. R. 12 Eq. 427.
(3) 3 Bro. C. C. 401.
(4) 25 Beav. 485.
(5) L. R. 6 Eq. 215.

[SWINFEN EADY M.R. Is it not necessary for you to show that the word "vested" applies to the 3000*l*.?]

The presumption is that the word "vested" was intended to keep the class open beyond the period when the eldest child attained twenty-one.

Owen Thompson was not called upon to reply.

SWINFEN EADY M.R. This is an appeal from a decision of Sargant J. which raises a short but important question on the construction of the will of Mrs. Deloitte. By her will she disposes of two sums of 4000*l*. and 3000*l*. [His Lordship read the gifts of the 4000*l*. and 3000*l*. as above set out, observing with regard to the latter that it was given to the same class, but without any previous life interest. He continued:] If that was all it would not be disputed that, under the gift of the 3000*l*. to the children of Edward Allbeury on attaining twenty-one, as soon as one child attained twenty-one the class would stop and the fund would be distributable among the children in esse. But the will does not stop there. It goes on: [His Lordship read the advancement clause as above set out, and continued:] It is said that the effect of that clause is that it extends to both the presumptive and vested shares, and therefore that it could not have been intended that a child of Edward Allbeury on attaining twenty-one should receive payment when advancement or benefit is given out of the same share. It is said that it would be idle to provide for advancement or benefit out of a share in respect of which a child was absolutely entitled to immediate payment.

There is an established rule known as the rule in *Andrews* v. *Partington* (1) by which, in the case of a bequest to a class the members of which would be entitled to payment on attaining twenty-one, on the first member attaining twenty-one the class stops. In *Andrews* v. *Partington* (2) Lord Thurlow said: "Where a time of payment was pointed out, as where a legacy is given to all the children of A. when they shall attain twenty-one, it was too late to say, that the time so pointed out shall [not] regulate among

(1) 3 Bro. C. C. 401. (2) 3 Bro. C. C. 404.

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Swinfen Eady M.R.

what children the distribution shall be made. It must be among the children in esse at the time the eldest attains such age. He said he had often wondered how it came to be so decided, there being no greater inconvenience in the case of a devise than in that of a marriage settlement, where nobody doubts that the same expression means all the children." But although Lord Thurlow said he wondered how it came to be so decided the rule was thereby established and is constantly referred to as the rule in *Andrews* v. *Partington*. (1)

In *Hagger* v. *Payne* (2) the rule is thus stated: "The third principle is this,—that where a legacy is given to a class at twenty-one, then, as soon as one of the class attains twenty-one, the fund becomes distributable, and by reason of the fund being then divisible, persons of that class afterwards coming into esse are necessarily excluded." That rule being established, is there anything on the face of the will, apart from decided cases, which shows an intention that the rule should be excluded? Although the rule is a rule of convenience intended to give effect to the intention of the testator, yet if the Court finds on the face of the will an intention to exclude the rule the Court will give effect to that intention. Is there any such intention shown on the face of this will? Here there are two funds of 4000*l*. and 3000*l*. given. As to the 4000*l*. fund there is an intermediate tenant for life, and no child, although he attains twenty-one, is entitled to require payment during the continuance of the life tenancy. So long as there is an existing tenant for life, there is no reason why the rule should apply. No rule of convenience requires that in such a case payment should be made to a child on attaining twenty-one.

In the case where there is an existing tenancy for life children may be born subsequently to the eldest child attaining twenty-one who would take vested interests on attaining twenty-one. A child's interest in this case on his attaining twenty-one would therefore be vested, but the amount of his share only presumptive; and although he attains twenty-one he is not entitled to require payment.

(1) 3 Bro. C. C. 401.

(2) (1857) 23 Beav. 474, 478.

With regard to the interest taken by the legatee in the first fund, as soon as he attains twenty-one, he acquires a vested share, but it cannot be said what aliquot proportion he will take. The eldest child on attaining twenty-one would take a vested but not an aliquot share, because during the lifetime of the tenant for life the share might be diminished. It would be presumptively one-fifth if there were five children, but on the birth of a sixth child it might be reduced to one-sixth. Here the will contains a power of advancement in respect of presumptive or vested shares. I am of opinion that it is applicable to the trust funds by treating the words "presumptive or vested" as applying to the 4000*l.* fund and the word "presumptive" as applying to the 3000*l.* fund. We are not obliged to read both words as applying to both gifts. Full effect can be given to the advancement clause by reading both words as applying to the 4000*l.* fund and the word "presumptive" as applying to the 3000*l.* fund. The result is that on the face of the will there is nothing to show that the rule is excluded nor any necessary implication that the 3000*l.* fund is not to be divided among the class when the eldest child attains twenty-one. Then are there any cases which require the Court to take a different view? Three cases were cited.

The first case is *Iredell* v. *Iredell*. (1) That was a very strong case on the facts. It is manifest there on the whole language of the will that the rule of convenience was excluded. Romilly M.R. there said: "The testatrix contemplated, therefore, that these clauses should apply to cases after a child had attained twenty-one or married, that is, after the very period at which, according to the principle of *Andrews* v. *Partington* (2), the child would be entitled to have payment of his share." And a little later on he said: "The advancement and maintenance clauses would be wholly unmeaning if they applied only to a child who was entitled to dispose of his share of the capital itself. It is clear, therefore, that until after the possibility of children has ceased, the maintenance clause is to have effect, whether a grandchild has attained twenty-one or

(1) 25 Beav. 485, 491. (2) 3 Bro. C. C. 401.

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married or not, and notwithstanding the liability of a subsequent addition to the class entitled.' " The language of the will there was so full as manifestly to exclude the rule of *Andrews* v. *Partington*. (1)

In *Bateman* v. *Gray* (2) on the second hearing of the case, Romilly M.R. took a different view from that taken by him on the first hearing. (3) It would appear from that case as first reported as if the gift of the fund in question subject to annuities was an immediate gift to a class notwithstanding the clause by which the testator empowered his trustees to advance in respect of vested shares and as though from the will as set out " vested " must apply to an immediate gift. The Master of the Rolls nevertheless there said (4): "I think the class fixed and ascertained when the eldest attains twenty-one." In the later report on the further hearing of the case (5) where the will is more fully set out, and where as to one moiety it appears there was a previous life interest, Lord Romilly had changed his view, and held that the class of children to take was not ascertained when the eldest child attained twenty-one. He said: "The word 'vested' is very strong, and I do not see how, in the face of it, the declaration can be supported. I must, therefore, set it aside."

In my opinion the existence of a clause referring to a "vested" share is not applicable, so as to prevent a share being payable which would otherwise be payable, to cases where upon the face of the will the same word has reference to another share which is subject to a life interest or which for some other reason would not be payable when the child attains twenty-one.

The only other case is *In re Courtenay*. (6) It will be sufficient to say as regards that case that the power of advancement was only to arise after the death of the testator's sisters, and that it was with reference to that period that the word " vested" was used, whereas but for that word the shares would have been payable when the eldest child attained twenty-one. There was in that case no previous life interest.

(1) 3 Bro. C. C. 401.
(2) L. R. 6 Eq. 215.
(3) 29 Beav. 447.
(4) 29 Beav. 449.
(5) L. R. 6 Eq. 215, 217.
(6) 74 L. J. (Ch.) 654.

For these reasons I am of opinion that there ought to be a declaration that the defendant, who is the only child now living of Edward Allbeury, became entitled on attaining twenty-one to be paid the trust legacy of 3000*l.* No question now arises as to the trust legacy of 4000*l.*

DUKE L.J. I am of the same opinion. Having heard the clear exposition of the will by the Master of the Rolls I have nothing to add to what he has said.

EVE J. I agree. The rule is settled that when there is simply a gift of a fund to a class, without any previous life interest, to be divided at twenty-one, the maximum number of those who are to take is ascertained when the eldest member of the class attains twenty-one. Malins V.-C. in *Gimblett* v. *Purton* (1) says that the object of the law is to make property vest as early as possible, so that the persons to whom it is given may know what they have to expect, and make the fund available at the earliest period. He adds, and I respectfully concur, that the rule "is a rule of convenience, and one that best suits the interests of society." But it is a rule the application of which may be excluded by the terms of the testator's will.

In *Iredell* v. *Iredell* (2) Romilly M.R. rightly held that the rule was excluded by the introduction of a power to advance exerciseable after a member of the class had attained twenty-one, and in *In re Courtenay* (3) Kekewich J. came to a like conclusion by the same reasoning.

For the reasons my Lord has stated I do not think the advancement clause in this case is so worded as to compel us to hold that the operation of the rule is excluded.

It is obvious that *Bateman* v. *Gray* (4) is not satisfactorily reported, and we cannot consider the matter as in any way concluded by that case.

Appeal allowed.

Solicitors: *Norton, Rose, Barrington & Co.; Wansey, Stammers & Co.*

(1) L. R. 12 Eq. 427, 430, 431.
(2) 25 Beav. 485.
(3) 74 L. J. (Ch.) 654.
(4) 29 Beav. 447; L. R. 6 Eq. 215.

W. I. C.

Applied. *Re* SILVERSTON (*decd.*). [1949] 1 All E.R. 641.
Distinguished. *Re* BEDFORD (*decd.*). [1951] 1 All E.R. 1093.

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Nov. 22.

In re COLE.

COLE *v.* COLE.

[1918 C. 1022.]

Will—Construction—Legacy on Condition of Legatee remaining in a certain "employment" for a specified period—Effect of Service in His Majesty's Forces during that period.

A testator gave a legacy of shares in a company to each of his three sons who should, prior to attaining 20, enter the employ of a named company, and remain in such employ until the age of 33. One of the sons, who was born in 1895, in 1913, before attaining the age of 20, entered the company's employ, but in September, 1914, he voluntarily, but with the consent of the company's directors, joined His Majesty's Forces, from which he had not obtained his discharge:—

Held, that the son had not ceased to be in the employ of the company, although from the time when he entered the Army he had not actively served the company.

By his will, dated January 24, 1912, C. B. Cole appointed executors and trustees, and by clause 13 of the will he gave to the trustees thereof 60,000 ordinary shares of 1*l.* each in H. J. Packer & Co., Ltd., and directed them to stand possessed of the shares, subject to powers of sale, exchange, and variation, and, subject to those powers, to assign or transfer to each of his sons, Brian S. Cole, Geoffrey B. Cole, and Roger H. Cole, who should, prior to attaining the age of 20 years, enter the employ of the company, or who should, prior to attaining the age of 20 years, intimate, by writing addressed to his trustees, his intention to enter the employ of the company, and should, prior to attaining the age of 23 years, actually enter the employ of the company, and who, in either case, should remain in such employ as aforesaid until the age of 33 years, 20,000 of such shares. But, in the event of only two of his said sons so going into, and remaining in, the employ of the company until the age of 33 years, the trustees were to transfer to each of such sons 30,000 of the said shares; and if only one should go into, and so remain in, the employ of the company, the trustees were to transfer 40,000 of the said shares. The remainder

of the said shares, or, if no son should be entitled to a transfer, then all the said shares, were to fall into, and form part of, the residuary estate. The will also expressed the testator's especial wish that the directors of the company should deal with any son who might be in the employ of the company in the same way as they would with any other employee, and his wish that if a son should neglect his duties, or show himself to be unfit or incompetent, and should by his behaviour be, in the directors' opinion, an undesirable employee, he should not be kept in the business, and should be dealt with in the same way as any other employee, regardless of the fact that by his being dismissed he might forfeit his right to any benefit under clause 13 of the will. The will also expressed the testator's desire that his said sons should understand that the provisions of clause 13 were solely for the purpose of encouraging them to go into the business, and do their utmost in the interest thereof, and become successful business men. The residuary estate was given upon trust for sale and conversion, and out of the income of the same and the investment of proceeds, and, if necessary, out of the 60,000 shares to pay the testator's widow an annuity of 4000*l.*, subject to the payment of which the residue was to be held upon trust for all the testator's five children, therein named, who should attain 24, in certain shares and proportions.

The testator died on June 26, 1912, and at the date of his death was chairman of the board of directors of the company, and owned over 125,000 ordinary shares therein.

The eldest son, Brian S. Cole, was born on October 1, 1895, and attained the age of 23 on October 1, 1918, his two younger brothers, Geoffrey and Roger, being then of the ages of 17 and 9 years respectively.

At the age of 18 Brian S. Cole entered the service of the company as a clerk at a nominal salary of 1*l.* 5*s.* a month (afterwards raised to 2*l.* 10*s.* a month), and he continued in this service until September 15, 1914, when he voluntarily enlisted, with the approval of the directors, in His Majesty's Forces, in which he had since continuously served. The

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evidence showed that, although during his absence on duty the directors, in view of the fortune to which he was contingently entitled, did not continue payment of his salary, yet neither they nor he at any time intended or desired to terminate his service with the company, and that both intended that those services should be resumed as soon as he obtained his discharge.

The trustees took out an originating summons, to which the testator's three sons, the two other residuary legatees, and the widow were defendants, for the determination of the question whether Brian S. Cole had remained in the employment of the company within the meaning of the will, notwithstanding his service with His Majesty's Forces since September 15, 1914; or, in the alternative, whether he would be contingently entitled to the benefits mentioned in clause 13 of the will, provided he was able to resume active performance of his duties as an employee of the company before October 1, 1918.

Nicholson Combe for the plaintiffs, stated the facts and the points raised by the summons.

Owen Thompson for Brian S. Cole. There has been no cesser of the eldest son's employment by the company. When a legacy was given to a person if in the testator's service at the time of his death, and at that time she was not actually rendering service, but the intention on both sides was that she should return to active service, she was held to be entitled to the legacy, notwithstanding that her services had been temporarily dispensed with: *Herbert* v. *Reid.* (1)

Dighton Pollock for two of the residuary legatees. The eldest son was no longer in the employment of the company when he had taken service in His Majesty's Forces: *Stretch* v. *Scout Motors, Ltd.* (2)

Gilbart-Smith for the annuitant and the two infant residuary legatees. Service with His Majesty's Forces, though meritorious in the highest degree, is incompatible with being employed by the company. In *Herbert* v. *Reid* (1) the absence

(1) (1810) 16 Ves. 481. (2) [1918] W. N. 238.

from the active duties of service was only temporary, whereas in this case it is for an indefinite period.

SARGANT J. This summons raises the question whether a son of the testator is in a position at the present time to become ultimately entitled, should he comply in future with the directions of the will, to a large number of shares in a company known as H. J. Packer & Co., Ltd.

The testator, who was a wealthy man, made his will, and thereby, after providing a large annuity, 4000*l.* a year, to his wife, he gave the residue of his property, including a large number of shares in this company, subject as to some of the shares to their being kept as a fund for the securing of the annuity, amongst his five children in certain accurately defined percentages. Then, being desirous that the three of his children who were sons should lead a business life and, if possible, remain connected with the company, in which he appears to have made a success, by clause 13 of his will he provided benefits for them by way of inducement for them to do so. [His Lordship read clause 13, and continued :] The eldest son, with regard to whom the question now arises, was born on October 1, 1895 ; and, well before attaining the age of 20 years, that is to say, immediately on attaining the age of 18 years, he entered the employment of the company, and that employment undoubtedly continued down to September 14 or 15, 1914. On that day, with the full assent of the directors of the company, and, as both he and they say, without any intention of quitting the employment of the company, he, very patriotically and properly, like most young men of his class, and a very large number of young men throughout the country, joined the Army, and he has remained in the Army ever since. As I understand, he joined as a private ; he has since obtained a commission ; he has been wounded ; he is now a lieutenant in the Royal Air Force ; and he has not yet obtained his discharge from the Army. He attained the age of 23 years, which is one of the ages mentioned in the will, on September 30, 1918.

The question which now arises is this : Assuming that he

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obtains his discharge from the Army as soon as reasonably possible, and then proceeds to work in the service of the company, and remains in that service till the age of 33 years, will he then be qualified to obtain this gift of 20,000 shares, or a certain larger number of shares which come to him in case either or both of his brothers does not or do not ultimately qualify? It is important for him, of course, to know how that is, and he desires to have a declaration at once, although the ultimate result will not be known until he has attained the age of 33 years. The four younger children, who appear by their guardian ad litem, see no objection at all to the matter being determined here now, especially as in the case of the two other sons the amount that they can take will depend upon the answer to this question, and might affect the desirability of their joining or not joining the company. I think, therefore, that although the time has not arisen when the shares have to be handed over, I am fully at liberty, having regard to the present practice of the Court, to deal with the question.

Now there is no doubt that, during the time that Mr. Brian Spearing Cole has been patriotically serving his country, there have been superior and exhaustive claims upon his services, and that he has not, in fact, been in a position to render any definite services to the company. But does it follow that he has ceased to remain in the employment of the company? I say ceased to remain in the employment of the company, because I think that, having regard to all that has happened, it is impossible for him to claim to take these shares under the alternative branch mentioned in the will. He has not, before attaining the age of 20 years, intimated, by writing addressed to the trustees, his intention to enter the company's employment; and further, I do not think that that alternative branch really applies to the case of his having previously entered the company's employment under the first alternative. I therefore have to consider whether he has ceased to remain in the employment of the company, so that it will be impossible for him, even if he comes back as quickly as possible and remains in the employ-

ment of the company till 33, to then predicate of himself that he has remained in the employment from the age of 20 years.

Now it seems to me that the question whether he is in the employment of the company is not the same thing as the question whether he is in fact rendering actual service to the company. Suppose that he had fallen ill, and had had to be away for a year, or two, or three years. Under those circumstances, the company might be justified in dismissing him, and very likely would dismiss him, and in that case he would certainly cease to remain in the company's employment. But, on the other hand, it is quite possible that the company, valuing his services, would desire to retain him in its employment, and would make arrangements under which that employment should continue, although no actual services were rendered. And whether or not they paid him a salary during that time would not be in any way conclusive; it would only be one of the indicia from which one might gather whether the employment did continue or did not.

Here, whether I look at the affidavit of Mr. Brian Spearing Cole himself, or at the affidavit made by the directors of the company, or at the terms of a written agreement entered into by Mr. Cole and the company a few weeks ago, just prior to his attaining the age of 23 years, it seems to me quite clear that the intention, both of the company, by its directors, and of Mr. Brian Cole, was that the employment should continue, but that there should be a temporary dispensation of obligation to render service under the contract of employment. The directors say that the only reason why they did not continue to make a payment to Mr. Brian Cole as they would have continued to make payments to other employees (and I should think very likely they did continue to make payments to other employees, although that is not stated), was that he was sufficiently provided for under the will of his father for it to be unnecessary for them to continue the weekly payments which they had hitherto been making. But, apart from that, it seems to me clear that they would otherwise have continued to treat him as an employee of

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the company in the sense of making him payments with relation to that employment.

The decision must turn on the answer to be given to the question of fact, whether the relations of employment between the employer and the employee were intended by both parties to remain as continuing conditions of employment. It seems to me that both parties intended that such relations were so to continue, although both parties intended also that during the necessary interval Mr. Brian Cole should be at liberty to serve his King and country.

I think the only very relevant case that has been cited to me is *Herbert* v. *Reid* (1), where a testator had given a legacy to his servant, and she was entitled to it only in case she was in his service at the time of his death. As a matter of fact, whether by virtue of some nefarious plan, as she suggested, on the part of the persons interested in the estate, or for some other reason, she had gone away from the house and ceased to render actual service to the testator for some little time before his death, and she was not expected to return to the house until he got well, if he had got well. Lord Eldon L.C. held that the servant was entitled to the legacy, and that she had not left the service in fact, although she had temporarily ceased to render services, and he considered that the question had to be determined upon the evidence that was given as to the state of mind of the testator, and the state of mind of the servant herself. The question was whether what took place amounted to an intention on both sides that the service should terminate, or whether it amounted to an intention that the actual services should be temporarily dispensed with, but that the employment should continue and be resumed in its full sense at a later date.

In my judgment, taking that case, as I think I am entitled to take it, as an authority, the evidence here fully bears out the contention of Mr. Brian Spearing Cole that his employment by the company continued, although there was a temporary dispensation by the directors, or a leave and licence granted by the directors, under which he was not to be bound to render

(1) 16 Ves. 481.

actual service during the time that he was employed in His Majesty's Forces. SARGANT J. 1918 COLE, *In re.* COLE *v.* COLE.

Solicitors: *Calder Woods & Pethick; Robbins, Olivey & Lake for Wansbroughs, Robinson, Tayler & Taylor, Bristol.*

F. E.

BURNS *v.* SIEMENS BROTHERS DYNAMO WORKS, LIMITED.

ASTBURY J. 1918 *Nov.* 5, 6.

[1918 B. 920.]

Company—Shares—Joint Holding—Right to split into Two joint Holdings—Names in different Order—Alteration of Register—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 32.

B. and H. were the registered joint holders of all a company's shares except the seven belonging to the signatories. Under the articles the first-named holder B. was alone entitled to vote, and the second-named holder H. could neither vote nor be appointed proxy for a poll, so that if B. was ill or absent the voting power was lost:—

Held, that in order to enable B. and H. effectually to exercise their voting power in all circumstances they were entitled to have their holding split into two joint holdings with their names in different orders, and that the register must be altered accordingly.

Observations of Warrington J. in *In re T. H. Saunders & Co.* [1908] 1 Ch. 415, 423 approved and applied.

Sect. 32 of the Companies (Consolidation) Act, 1908, is not exhaustive and does not prevent the Court from altering the register in cases other than those therein specified.

WITNESS ACTION.

The plaintiffs Burns and Hambro were the present trustees of a trust deed of June 27, 1900, securing an issue of debenture stock of Siemens Brothers & Company, Limited, hereinafter called the Siemens Company.

Under this deed and a supplemental agreement of June 19, 1906, the trustees held 19,993 fully-paid shares of 10*l.* each in the defendant company, hereinafter called the Dynamo Company, as part of the specifically mortgaged premises of the Siemens Company.

The remaining seven shares were held by the seven signatories

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to the memorandum of the Dynamo Company, who were all men of substance and officers of the Siemens Company, three of them being directors of the Siemens Company and also of the Dynamo Company, which had been formed to work a special branch of the Siemens Company's business.

The 19,993 shares were registered in the joint names of Burns and Hambro in 1907 in the Dynamo Company's register, and their names still stood in that order.

This was found inconvenient, as under the articles the second named holder Hambro was neither entitled to vote nor be appointed proxy for a poll, so that if Burns was ill or absent the voting power was lost. The seven signatories represented the Siemens Company's interest, and were not available as proxies for the trustees. The articles provided as follows :—

By article 1 the following words and expressions have the following meanings unless excluded by the subject or context :—

(*n*) "The Register of Members" means the register of members to be kept pursuant to the Companies Act, 1862.

(*q*) Words importing the singular number only include the plural number and vice versa.

By article 25 not more than four persons shall be registered as the joint holders of a share.

By article 31 every share shall be indivisible. If several persons are registered as joint holders of any share the certificate for such share may be delivered to any one of such joint holders on behalf of all of them, and subject to the provisions of article 33 [as to the renewal of lost certificates], only one certificate for shares held in joint names shall be issued.

By article 32, subject to the provisions of article 31, every member shall be entitled to a certificate specifying the shares held by him.

By article 51 the joint holders of a share shall be severally as well as jointly liable for the payment of all calls in respect thereof.

By article 67 the register of members shall be kept by the secretary, under the control of the board, and (article 68) shall be open to the inspection of the members.

By article 128 three members personally present shall be a quorum for a general meeting, and by article 129 no business shall be transacted at any general meeting unless a quorum be present at the commencement of the business.

By article 145, on every question to be decided by poll, every member present at the meeting in person or by proxy, and entitled to vote thereat, shall have one vote for every share held by him.

By article 147 if more persons than one are jointly entitled to a share, the person whose name stands first in the register of members, as one of the holders of the share, and no other, shall be entitled to vote in respect thereof.

By article 150 a member entitled to vote may, from time to time, appoint any other member entitled to vote as his proxy in voting at any poll.

By article 175 all notices to registered members shall with respect to any share to which persons are jointly entitled be given to whichever of such persons is named first in the register of members, and notice so given shall be sufficient notice to all holders of such share.

In these circumstances the trustees desired that their holding should be split into two approximately equal holdings, in one of which Burns and in the other Hambro should stand first.

On April 29, 1918, the trustees gave a written notice to the Dynamo Company requiring them to alter the register by placing 9993 of the shares numbered 10,001 to 19,993 in the joint names of Hambro and Burns and in that order.

On April 30, 1918, the Dynamo Company refused to make this alteration.

On May 3, 1918, the trustees brought this action against the Dynamo Company for a declaration that they were entitled to have the register altered in the way they asked, an order for that alteration, and an injunction restraining the Dynamo Company from holding any general meeting until it was so altered.

On May 28, 1918, Astbury J. on an interlocutory motion made an order to rectify, but on June 10, 1918, the order was

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discharged by the Court of Appeal on the ground that substantive relief ought not to be granted on an interlocutory application. (1)

Hon. Frank Russell K.C. and *H. E. Wright* for the trustees. As between the trustees and the Dynamo Company the trustees are absolute owners of the shares, and are entitled to have their names registered in any order they choose: *In re T. H. Saunders & Co.* (2)

Consequently, if they were to retain Block A and transfer Block B to a third person, he could retransfer Block B to them with their names reversed. They would then be entitled to have Block B, an entirely different set of shares from Block A, registered with Hambro's name first. The technical breach of trust involved by parting with the shares for a short time would not avail the company.

But it cannot be necessary to go through this form in order to enforce the trustees' legal rights of property. The company must alter the register.

[ASTBURY J. Can the company be compelled to alter the register except under s. 32 of the Companies (Consolidation) Act, 1908?]

Certainly. Sect. 32 is not exhaustive. It enables the Court to rectify wrong entries or omissions, but it does not deprive the Court of its inherent jurisdiction to enforce legal rights of property in other cases.

The proposed splitting will not increase the voting power on a poll, but only render it more effectually exercisable. The articles will still be complied with, as there will be only one certificate for each block of shares, and the first-named holder of each block will alone be able to vote in person or by proxy in respect of that block.

Gore-Browne K.C. and *Percy Wheeler* for the Dynamo Company.

The shares have been properly registered under s. 25, and apart from s. 32, which is admittedly inapplicable, the company cannot be compelled to alter its register.

(1) [1918] 2 Ch. 324. (2) [1908] 1 Ch. 415, 423.

Possibly the trustees as joint holders were originally entitled to choose the order of their names for registration so that the first-named could exercise on behalf of all the right of voting that belonged to them collectively (*In re T. H. Saunders & Co.* (1)), in which case however the point was neither argued nor decided.

But the joint holders are the same joint holders whatever the order of their names, and it would be contrary to the spirit of the articles, especially articles 31, 147, and 150, that they should have more than one joint holding.

No doubt the trustees could transfer Block B to a third person and the company would have to register the transfer. But if Block B were retransferred to the trustees as joint holders though with their names reversed it would simply be treated as an augmentation of their then existing joint holding Block A, and registered accordingly. It would not be registered as a distinct and separate block.

The proposed splitting, though not increasing the voting power on a poll, would double it on a show of hands. The application is unprecedented and should be dismissed.

ASTBURY J., after stating the facts. The trustees contend that unless prevented by contract they are entitled to exercise their right of dominion in respect of these shares, at all events as between themselves and the Dynamo Company, and they say that no such contract exists. They rely on *In re T. H. Saunders & Co.* (1), where Warrington J. said: "Mr. Terrell has said that the company may, if it pleases, insist on having the names of the executors inserted in such order as it chooses" —that is, the executors of a deceased shareholder.—"He does not so insist, but he says he might so insist, if he chose to do so, on his strict rights in that respect. That appears to me to be an entire misconception of the position of the company. It seems to me that the joint holders of shares are entitled to arrange among themselves which of them shall stand first on the register of members and exercise on

(1) [1908] 1 Ch. 415, 423.

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behalf of all the right of voting which belongs to them collectively."

The trustees admit that their case is not within s. 32 of the Companies (Consolidation) Act, 1908, but contend that they are entitled to the relief they ask as part of their general legal rights as owners of their shares.

The Dynamo Company, on the other hand, submits that it is under no compellable legal obligation to act as the trustees desire in respect of their property. It contends that it has fulfilled its whole obligation under s. 25 in the matter of registration, and that apart from the provisions of s. 32 no relief by way of alteration of the register can be obtained. It correctly points out that the contract between the parties throws no express obligation upon it to make the alteration required. It submits that the rectification in *In re T. H. Saunders & Co.* (1) was due to a wrong entry in the register, and that Warrington J.'s remarks refer only to the original entry of the names, and that the matter was not argued. It further contends that articles 31, 147, and 150, although not forbidding the required alteration, point against the plaintiffs being entitled thereto as of right.

Now article 31 does not really bear on the point at all. It is simply an article providing that there shall only be one certificate in respect of each share or block of shares held by persons in joint names. Article 147 is confined to the prevention of double voting in respect of the same share or shares, and does not touch the present point. The company contends that article 150, read in conjunction with article 147, implies that in respect of joint shares once registered the sole right of voting and appointing a proxy is limited as therein mentioned. But this has little bearing on the issue I have to decide. So long as joint shares stand registered in the names of two or more persons the first named is alone entitled to vote, and is unable to appoint his co-trustee or trustees as his proxy or proxies to vote in respect of those shares. It does not touch the question whether joint owners of a block of shares are entitled to have them split as the trustees desire.

(1) [1908] 1 Ch. 415.

Now the trustees are the present legal owners of these shares, and entitled to exercise their full voting rights thereon so long, at all events, as they do so fairly and honestly. It was intended when the shares were registered in their names that these voting rights should be a reality. But if, as the register now stands, Burns should be ill or away, these voting rights, personally or by proxy, would be unexercisable. That is inconsistent with the trustees' right of property in the shares.

The Court of Appeal has not decided the question in this action, and there is no direct authority upon it. The point was neither argued nor decided in *In re T. H. Saunders & Co.* (1), but Warrington J. indicated a view pro tanto inconsistent with the company's present contention, and with this view I concur.

Sect. 32 is not exhaustive or conclusive of the issue. It provides for the rectification of a wrong register, but it does not prevent the joint owners of shares protecting, as distinct from increasing, their voting rights, and it does not negative all cases of alteration of the register other than those expressly referred to. The Dynamo Company and its directors are, I think, under an obligation in law not to prevent a fair and reasonable exercise by the members of their rights of dominion in their own property, consistent with the constitution of the company of which they are the principal corporators, and as between the Dynamo Company and the trustees the absolute dominion in these shares is in the latter.

In the circumstances the trustees' request is reasonable. If it is not complied with, their ability to exercise their voting rights may at any time be in jeopardy through no fault of their own. By virtue of their property in these shares they are entitled to have them so entered upon the register as to enable them to exercise their admitted voting power in the event of one of them being unable to be present in person at the company's meetings. The register must be altered as the trustees desire, not because it is wrong and liable to rectification under s. 32, but because the trustees are entitled

(1) [1908] 1 Ch. 415.

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reasonably and at all times to exercise their joint rights as members. (1)

Solicitors for trustees: *Bircham & Co.*
Solicitors for Dynamo Company: *Roney & Co.*

G. R. A

ASTBURY J. 1919 *Jan.* 15, 17.

In re GLADWIN'S TRUST.

[1918 G. 1278.]

Settled Land—Investments—Capital Money—Leasehold House for Life Tenant's Residence—Heavy Ground Rent—Direction of Life Tenant—Control of Court—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 21, 22, 53.

Sect. 22, sub-s. 2, of the Settled Land Act, 1882, is limited by s. 53 and does not entitle a life tenant to insist on applying capital money on an investment not advisable for an ordinary trustee of trust funds.

In re Hunt's Settled Estates [1905] 2 Ch. 418; [1906] 2 Ch. 11 applied.

A life tenant directed the trustees of settled real estate to raise 3500*l.* out of securities worth 9600*l.* representing the proceeds of sale of the entire real estate and to apply the 3500*l.* in the purchase of a leasehold residence he had contracted to buy. The lease had 83 years to run, but the ground rent was 190*l.* The purchase was advised by the life tenant's valuers but deprecated by the trustees' valuer, and, the remainderman being an infant, the trustees declined to proceed without the Court's sanction:—

Held, that as no ordinary trustee would be justified in making such an investment, the Court could not sanction it; and the fact that the life tenant was buying the house for a residence, and that both he and the infant remainderman were wealthy persons independently of the settlement, made no difference.

Whether a life tenant can compel trustees to realize securities on which capital money has been invested under s. 25, sub-s. 1, in order to provide capital money for a purpose specified in some other sub-section, *quære.*

ORIGINATING SUMMONS.

By an antenuptial settlement of October 19, 1908, made prior to the applicant's first marriage, certain real estate was settled on trusts under which on the termination of certain prior life interests and in the events that happened the appli-

(1) An appeal from this decision was withdrawn.

cant, in virtue of a trust to pay him the net rents and profits for life until bankruptcy or alienation, became equitable life tenant in possession with remainder to the only child of that marriage, a son Gerald, now aged 9, contingently on his attaining 21, subject to any appointment the applicant might make in favour of Gerald or his issue.

By another settlement of the same date and made with the same trustees who were Settled Land Act trustees of the realty settlement a considerable amount of personalty was settled. The husband's fund was 100,000*l.* The investments of this fund producing a gross income of about 4000*l.* now belonged to the applicant for life until bankruptcy or alienation with remainder to Gerald contingently on attaining 21 subject to any appointment the applicant might make in favour of Gerald or his issue, and subject to the applicant's power to appoint either 25,000*l.* or one-fourth of the securities, whichever was the greater value, in favour of his wife and children by his second marriage. The wife's fund was 10,000*l.*, and the investments producing a gross income of about 440*l.* now belonged to Gerald contingently on his attaining 21, the applicant's interest therein having ceased on his second marriage.

The applicant's first wife died on May 5, 1912, and in December, 1914, he married his second wife. There were children of this marriage. From this time Gerald resided with his maternal grandparents.

On March 30, 1915, the applicant sold the real estate for 13,000*l.* under the powers of the Settled Land Acts, and after payment of estate duties and other expenses the net purchase money, about 11,250*l.*, was by his direction invested by the trustees in certain securities now worth about 9600*l.* and producing a gross income about 470*l.*

On November 6, 1918, the applicant, being desirous of acquiring a residence for his present wife and family, contracted as equitable life tenant of the realty settlement to buy a leasehold house in Mayfair for 3500*l.*

The lease granted by the Ecclesiastical Commissioners was dated June 29, 1905, and the title was registered under the

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Land Transfer Act, 1897 (60 & 61 Vict. c. 65). The term was 99 years from September 29, 1902, leaving about 83 years to run. The ground rent was 190*l.* The rack rent was assessed at 500*l.* gross and the net rateable value at 417*l.* The contract was conditional on the approval of the trustees or the Court being obtained by December 25, 1918, afterwards extended to January 20, 1919, as it was intended that the 3500*l.* should be paid out of capital money.

The applicants' valuers advised that the house, which was in excellent condition, must have cost 6000*l.* to build, and that a similar house would now cost 12,000*l.*, and though the ground rent was high it was not high for the neighbourhood. The 3500*l.* purchase money was only about 11 years' purchase of the profit rental. On a voluntary conveyance to the vendor in 1912 the Government valuer at first assessed the value at 5500*l.* for stamp duty, and was only after considerable difficulty persuaded to lower the assessment to 4750*l.* The purchase of the house for 3500*l.* would be a perfectly safe and proper investment of the trust funds.

The trustees' valuer on the other hand laid great stress on the high ground rent as an objection to the purchase. He pointed out that the lease had been in the market for a considerable time, and since March, 1918, at the present price of 3500*l.* If it was desired to sell or let the house difficulty and delay would probably be encountered before a purchaser at 3500*l.* or a tenant at an adequate rent could be secured, and taking all the facts into account he did not consider the house a desirable investment for trust funds.

In these circumstances the trustees declined to approve the purchase or to apply capital money therefor without the sanction of the Court, and on November 27, 1918, the applicant issued this summons to obtain that sanction.

As the vendor was satisfied with the applicant's covenants and did not require any from the trustees, it was proposed that the title should be registered in the applicant's name under s. 6, sub-s. 1, of the Land Transfer Act, 1897, so that the trustees should not be liable either in covenant or by privity of estate.

Ashworth James for the applicant. This is an authorized investment under s. 21, sub-s. 7, and bona fides being admitted the applicant is entitled on his valuers' advice to direct this investment under s. 22, sub-s. 2.

[ASTBURY J. The trustees' valuer deprecates it. The ground rent, rates and property tax come to about 500*l.* a year.]

That is why the price is so low. It is not the case of an ordinary trustee investing trust money. It is a mere question of value, and the applicant is the proper person to decide on the propriety of the investment: *In re Lord Coleridge's Settlement.* (1) He can easily pay the outgoings out of his large income and the remainderman Gerald will be very well off. The applicant would secure the bargain himself if the provision against alienation did not prevent him from borrowing. The property may of course depreciate. But so may any of the existing investments.

[ASTBURY J. The depreciation of ordinary investments does not leave the estate saddled with a heavy liability, which if not met would cause a forfeiture and a loss of the 3500*l.*]

That consideration would prevent any leasehold investment and repeal s. 21, sub-s. 7. It is merely a question of value. The applicant can insist on the investment, unless the trustees show that it ought to be restrained as a breach of trust: *In re Lord Coleridge's Settlement.* (1)

In *Hampden* v. *Earl of Buckinghamshire* (2) a life tenant was restrained from mortgaging a settled estate to the prejudice of annuitants in order to pay off a mortgage on part of it. But Lindley L.J. pointed out that a sale which merely substituted money for land and preserved all rights was in a different position. The same remark applies to a purchase. In *In re Hotham* (3) Cozens-Hardy J. held that on an investment on mortgage the trustees were bound to satisfy themselves as to value, title and form, but the Court of Appeal held that on being satisfied that the life tenant's direction had been given upon a proper investigation as to title, report as to value, and advice as to form, they were bound to make the investment.

(1) [1895] 2 Ch. 704, 707.
(2) [1893] 2 Ch. 531, 544.
(3) [1901] 2 Ch. 790; [1902] 2 Ch. 575.

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In other words, the life tenant acting bona fide under competent advice is the sole judge of the propriety of an investment. The trustees are mere custodian trustees and can only refuse to make the investment by showing it is a clear breach of trust as in *In re Hunt's Settled Estates.* (1) The onus is on the trustees to show that this is an investment for which the applicant could be made personally liable if it turned out badly. That is clearly not the case here.

R. H. Hodge for the trustees. The only thing certain about this investment is the liability for 190*l.* ground rent. The future selling and letting value is quite problematical. The applicant, though a life tenant, is a trustee for himself and Gerald under s. 53, and as such is in the position of an ordinary trustee: *In re Hunt's Settled Estates.* (2) The test therefore is whether an ordinary independent trustee would be justified in making this investment. Obviously not. The fact that the applicant and Gerald are wealthy is absolutely immaterial. The applicant's intention to reside in the house might be material if there were any means of securing the continuance of that residence. Short of that it is immaterial.

Again, the proceeds of sale having been invested under s. 21, sub-s. 1, there is no longer any capital money available for this purchase. It is true that s. 22, sub-s. 4, requires the life tenant's consent to any alteration of investment, and that securities may be converted into capital money under sub-s. 7, but there is nothing to compel the trustees to convert them at the life tenant's direction. His powers in this respect are purely restrictive.

The same point was taken and discussed in *In re Lord Stafford's Settlement* (3), but as the existing investment had not been made under the Settled Land Acts Warrington J. merely said that the point did not arise. In the present case it clearly arises, and, having regard to the fall in value of the existing investments, the trustees strongly rely on it.

Ashworth James in reply. The last point if established

(1) [1905] 2 Ch. 418; [1906] 2 Ch. 11.

(2) [1905] 2 Ch. 418, 423, 424; [1906] 2 Ch. 11.

(3) [1904] 2 Ch. 72, 76, 85.

would stultify the Settled Land Acts. But there is nothing to support it. Sect. 21 provides eleven modes of investing or applying capital money. The first mode is investment on Government or other securities "with power to vary the investment into or for any other such securities." The seventh mode includes the purchase of long leaseholds. By s. 22, sub-s. 2, the investment, obviously with power to vary, shall be made according to the life tenant's direction and (sub-s. 4) cannot be altered without his consent. By sub-s. 5 capital money and its investments shall for purposes of "disposition, transmission and devolution" be considered as land. Disposition obviously refers to sale or realization.

By sub-s. 6 the income of the securities shall be applied as income of land and by sub-s. 7 the securities may be converted into capital money. All these matters are in the life tenant's discretion: *In re Keck's Settlement* (1); see also Wolstenholme's Conveyancing and Settled Land Acts, 10th ed., p. 413.

R. H. Hodge in rejoinder. The power to vary is limited to variation inter se of investments under s. 21, sub-s. 1.

ASTBURY J., after stating the facts. The applicant contends that s. 22, sub-s. 2, of the Settled Land Act, 1882, entitles him as life tenant of the realty settlement to direct how the capital moneys held thereunder shall from time to time be invested, and that the trustees, assuming the applicant to be acting bona fide, are bound to invest 3500*l.* in the purchase of this house accordingly.

I am not able to take that view of his rights under the Act. Sect. 53 provides that the life tenant shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties. It is clear that the life tenant is entitled to the full benefit of all the legal incidents of his life estate, but when it comes to the exercise of his powers under the Act he is then a trustee of those powers and liable and accountable as such.

(1) [1904] 2 Ch. 22, 26.

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A considerable amount of evidence has been filed on this summons and I appreciate the importance to the applicant of being able, if he is entitled to do so, to acquire a house for the purpose of living in it with his present wife and family. On the other hand I have no doubt that as far as I am concerned I am bound to consider in the interests of the remainderman whether the proposed investment is such an investment as a prudent trustee acting as such would make of the trust funds subject to his trust. The evidence filed on behalf of the applicant is to the effect that although the ground rent of this property is high, it is a good and sufficient security for the price proposed to be paid. The evidence filed by the trustees is to the effect that this is not a good investment, and in that conflict of opinion I have no alternative but to exercise my own views on the evidence as it stands as to whether this is or is not an investment that I ought to sanction.

A number of authorities have been cited, and the applicant relies chiefly on *In re Lord Coleridge's Settlement.* (1) In that case Chitty J. held that the exercise in good faith of the power of direction as to investment or other application of capital money in the hands of trustees given to a life tenant by s. 22 cannot be controlled by the trustees or by the Court. But that decision must be regarded in the light of the particular facts. The settlement expressly sanctioned the investment of trust moneys subject to it in a number of securities outside those referred to in the Settled Land Act. The life tenant, bona fide and properly advised, chose certain outside investments so authorized, and directed the trustees to invest the trust moneys in those investments. Chitty J. was of opinion that the life tenant in that case was acting within his trusts under s. 53, and that in the circumstances the Court had no power to prevent the honest exercise of his discretion accordingly.

In *In re Hunt's Settled Estates* (2), the facts of which are wholly different, Farwell J. considered the meaning and effect of s. 22, sub-s. 2, and s. 53, in the light of *In re Lord Coleridge's Settlement* (1), and apart from the facts of that case he

(1) [1895] 2 Ch. 704, 707.

(2) [1905] 2 Ch. 418, 423, 424.

expressed his views in this way: "As I follow Mr. Parker's argument, his contention is that if the property chosen is leasehold, with the right number of years unexpired, and the tenant for life has selected it, and there is no mala fides, the Court cannot interfere with him in any case." That is in substance the argument which has been addressed to me on behalf of the present applicant. The learned judge then proceeded: "I dissent altogether from that proposition. The tenant for life is a trustee under s. 53, and his liability follows from his position as trustee; he is neither in a better nor in a worse position than any ordinary trustee who has a discretionary power to invest in leaseholds." And he cites a passage of Lindley L.J. in *Hampden* v. *Earl of Buckinghamshire* (1), a case again in which the facts have no relevance to this, as follows: "Assuming a tenant for life to be acting bona fide and with a view to preserve the estates for those intended by the settlor to enjoy them, still an honest trustee may fail to see that he is acting unjustly towards those whose interests he is bound to consider and to protect; and, if he is so acting, and the Court can see it although he cannot, it is in my opinion the duty of the Court to interfere." An appeal from Farwell J.'s decision was dismissed on the facts, and his views on the law were confirmed. (2)

The present case differs in its facts from any that have been cited. It is a case where the applicant has been a party to a settlement of large sums of money, which in the circumstances are all held for Gerald the child of the first marriage in remainder subject to the applicant's right to appoint away a sum of 25,000*l.*; but although the remainderman in this case is thus entitled to a large interest in remainder, I am none the less bound to consider, independently of that fact, whether the investment of 3500*l.* in this leasehold house is such an investment as an ordinary prudent trustee ought to make. If the applicant were suggesting an investment of this sum in the house in question, not for the purpose of residence but purely for the purpose of an investment of that amount of trust money, I should imagine that no one in his senses would

(1) [1893] 2 Ch. 531, 544. (2) [1906] 2 Ch. 11.

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dream of entertaining it; no ordinary trustee would dream of investing 3500*l.* in a leasehold house with a ground rent of 190*l.* a year. This house is assessed at over 400*l.* a year, and the liability for ground rent and income tax, especially having regard to the present state of taxation in this country, is extremely heavy in relation to the amount of the purchase money proposed to be paid. That being so the question is whether the fact that the applicant is desirous of acquiring this house to live in with his present wife and her family is a sufficient reason for sanctioning what in other circumstances would be a bad investment. In my opinion it is not. The test I am bound to apply is whether the investment of this money is such as an ordinary trustee with an ordinary discretion of investing trust funds would be well advised in making. I am satisfied that that is not so. In these circumstances, much as I regret it on the applicant's behalf, I feel unable to sanction this investment.

The trustees have taken a second point which it is not necessary for me in the circumstances to determine. They contend that the proceeds of sale of this settled estate having been in fact invested under s. 21, sub-s. 1, the provisions of s. 22, sub-s. 2, that the investment or other application by the trustees of capital moneys shall be made in accordance with the life tenant's direction, no longer apply, because, they say, there are no uninvested capital moneys now that fall within the provisions of that sub-section. This is a very important question, and the contention of the trustees is somewhat startling, but having regard to the view I take on the first part of the case I do not propose to go further into that matter.

Solicitors: *Williams & James; Gush, Phillips, Walters & Williams.*

G. R. A

In re LAYCOCK.

LAYCOCK *v.* SPECIAL COMMISSIONERS FOR INCOME TAX.

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[1918 L. 1173.]

Executors and Administrators—Insolvent Estate—Administration out of Court—Crown Debt—Priority—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 33, *sub-ss.* 1, 5, 7.

Sect. 33 of the Bankruptcy Act, 1914, which, after giving statutory priority to certain Crown and other debts in the distribution of a bankrupt's or deceased insolvent's property, provides that subject thereto all debts shall be paid pari passu, does not apply to the private administration of a deceased insolvent's estate out of court. It does not therefore affect the common law priority of any Crown debt in such a case.

In re Heywood [1897] 2 Ch. 593 applied.

ORIGINATING SUMMONS.

On October 16, 1915, W. S. Laycock was assessed for super-tax for the year ending April 5, 1916, in the sum of 119*l.*, and on February 16, 1916, he paid 500*l.* on account.

On March 2, 1916, he died intestate and insolvent, and on August 16, 1917, the plaintiff took out letters of administration to his estate.

On September 24, 1917, the assessment for super-tax was reduced to 107*l.*, being the proportion payable for the period up to and including the day before the intestate's death under the Finance Act, 1912 (2 & 3 Geo. 5, c. 8), s. 6. This left 57*l.* still payable.

The secured creditors having realized their securities and the estate, which was being administered out of court, being insolvent, the question arose whether the Crown debt of 57*l.* ought to be paid in full in preference to the claims of other creditors, or whether it only ranked for dividend pari passu with those claims.

On October 12, 1918, the plaintiff issued this summons against the Special Commissioners and a large specialty creditor to determine the point.

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Whinney for the plaintiff.

Sheldon for the Special Commissioners. Super-tax is an additional income tax. We cannot however claim statutory priority under s. 33, sub-s. 1, of the Bankruptcy Act, 1914 (1), as the assessment was up to April 5 after the death.

(1) The following statutes are material:—

The Judicature Act, 1875 (38 & 39 Vict. c. 77), omitting provisions as to companies in liquidation, provides as follows:—

Sect. 10: "In the administration by the Court of the assets of any person who may die after the commencement of this Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities . . . . the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable . . . . as may be in force for the time being under the law of bankruptcy with respect to the estates of persons adjudged bankrupt. . . . ."

The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), provided as follows:—

Sect. 40, sub-s. 1: "In the distribution of the property of a bankrupt there shall be paid in priority to all other debts" certain rates "and all . . . . income tax assessed on him up to April 5 next before the date of the receiving order, and not exceeding in the whole one year's assessment."

Sub-s. 4: "Subject to the provisions of this Act all debts proved in the bankruptcy shall be paid pari passu."

Sect. 125 enabled the creditor of a deceased insolvent to obtain an administration order in bankruptcy.

Sect. 150: "Save as herein provided the provisions of this Act relating to . . . . the priorities of debts . . . . shall bind the Crown."

The Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), omitting provisions as to companies in liquidation, provided as follows:—

Sect. 1, sub-s. 1: "In the distribution of the property of a bankrupt . . . . there shall be paid in priority to all other debts" certain rates "and all . . . . income tax assessed on the bankrupt . . . . up to April 5 next before the date of the receiving order . . . . and not exceeding in the whole one year's assessment."

Sub-s. 5: "This section, so far as it relates to the property of a bankrupt, shall have effect as part of s. 40 of the Bankruptcy Act, 1883."

Sub-s. 6: "This section shall apply, in the case of a deceased person who dies insolvent, as if he were a bankrupt, and as if the date of his death were substituted for the date of the receiving order."

Sect. 3: "This Act shall apply only in the case of receiving orders and orders for the administration of the estates of deceased debtors according to the law of bankruptcy made . . . . after the commencement of this Act."

The Bankruptcy Act, 1914, provides as follows:—

Sect. 33, sub-s. 1: "In the distribution of the property of a bankrupt there shall be paid in priority to all other debts" certain rates "and all . . . . income tax assessed on the bankrupt up to April 5 next before the date of the receiving order, and not exceeding

But Crown debts have a priority at common law: Bacon's Abridgment, Vol. III., p. 513; *In re Henley & Co.* (1)

[*Philip Stokes* for the defendant creditor. That is only as against creditors of equal degree. The assets have first to be apportioned rateably between the specialty and simple contract debts: *In re Bentinck.* (2)]

Such an apportionment is in direct conflict with the Administration of Estates Act, 1869 (Hinde Palmer's Act), (32 & 33 Vict. c. 46): *In re Samson* (3); *In re Harris.* (4)

[*Stokes.* In the face of those authorities I cannot rely on *In re Bentinck.* (2)]

The only question therefore is whether s. 33 of the Bankruptcy Act, 1914, which binds the Crown, applies to the private administration of a deceased insolvent's estate out of court. If so the common law priority would be gone under sub-s. 7.

At first sight the point would seem to be completely covered by sub-s. 5. But the Bankruptcy Act, 1914, being merely "An Act to consolidate the law relating to Bankruptcy" must be construed in accordance with the decisions on the previous Acts on which sub-s. 5 is founded: Craies on Statute Law, 2nd ed., p. 324.

Those Acts were in fact limited to Court administrations. The Judicature Act, 1875, s. 10, which applied the bankruptcy rules to the administration of the estates of deceased insolvents was expressly so limited.

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in the whole one year's assessment."

Sub-s. 5: "This section shall apply, in the case of a deceased person who dies insolvent, as if he were a bankrupt, and as if the date of his death were substituted for the date of the receiving order."

Sub-s. 7: "Subject to the provisions of this Act, all debts proved in the bankruptcy shall be paid pari passu."

Sect. 151: "Save as provided in this Act, the provisions of this Act relating to . . . . the priorities of debts . . . . shall bind the Crown."

Sect. 168 repeals the Bankruptcy Act, 1883, with immaterial exceptions, and the Preferential Payments in Bankruptcy Act, 1888, of which ss. 1, 2, and 3 so far as relating to companies had already been repealed by the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), s. 286.

(1) (1878) 9 Ch. D. 469, 481.
(2) [1897] 1 Ch. 673.
(3) [1906] 2 Ch. 584, 592.
(4) [1914] 2 Ch. 395.

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The Bankruptcy Act, 1883, s. 40, gave certain priorities in the distribution of a bankrupt's property, but did not deal with the estates of deceased insolvents. These were left to be administered in bankruptcy under s. 125 or in Chancery under the Judicature Act, 1875, s. 10.

The Preferential Payments in Bankruptcy Act, 1888, s. 1, extended the priorities of s. 40 of the Bankruptcy Act, 1883, and sub-s. 6 made the Act applicable to deceased insolvents.

But it still only applied to actual bankruptcies or administrations in bankruptcy or in Chancery: *In re Heywood.* (1)

[ASTBURY J. Sect. 3 expressly provided that the Act should only apply to future receiving orders and administration orders. There is no corresponding section in the Bankruptcy Act, 1914.]

The Legislature wished to prevent the Act being retrospective, and provided for the only cases to which they thought it could possibly apply—namely, receiving orders and administration orders. A private administration out of court was neither contemplated nor provided for.

Sect. 3 being therefore merely a temporary time-limit section is spent, and it was unnecessary to reproduce it in the Bankruptcy Act, 1914.

But s. 33, sub-s. 5, of the Bankruptcy Act, 1914, is an exact reproduction of s. 1, sub-s. 6, of the Preferential Payments Act, 1888, and must be construed in the same way.

In other words, it is limited to Court administrations, and in private administrations the Crown's priority is unaffected.

Philip Stokes for the defendant creditor.

Sect. 3 of the Preferential Payments Act, 1888, had a twofold operation. First, it made the Act non-retrospective; and secondly, it limited its operation to Court administrations. Apart from that limitation it would clearly have applied to private administrations out of court.

In *In re Heywood* (1) Stirling J. merely decided that the

(1) [1897] 2 Ch. 593.

Act applied to administrations in Chancery as well as in bankruptcy, and in the former case only where the insolvent died after the commencement of the Act.

In the Bankruptcy Act, 1914, s. 33, the limitation to Court administrations is dropped, and (semble) advisedly dropped, there being really no reason except in the case of judgment creditors why the same priorities should not obtain in private as in Court administrations. Sub-s. 5 is perfectly general, and there is nothing to limit it to Court administrations. In the present case the Crown has admittedly no statutory priority under sub-s. 1, and can therefore only claim rateably under sub-s. 7.

ASTBURY J., after stating the facts. From the earliest times Crown debts have had a priority at common law. The nature and extent of this priority are set out and discussed in Bacon's Abridgment, Vol. III., pp. 513, 514. The second defendant originally intended to claim priority as a specialty creditor, but since the passing of Hinde Palmer's Act and the decision of the Court of Appeal in *In re Samson* (1), any such contention is impossible, and it has not been pressed. Hinde Palmer's Act was intended to abolish, and did abolish, the distinction between specialty and simple contract debts, and put estates of this sort in the same position as though those debts were debts of one class.

That being so the only question argued was whether s. 33 of the Bankruptcy Act, 1914, applies in the present case.

Before referring to that statute it is necessary to consider very shortly the previous statutory provisions that have dealt with the question of preferential payments. Sect. 10 of the Judicature Act, 1875, provided that in the administration "by the Court" of the assets of a person dying after the commencement of the Act whose estate should be insolvent, the same rules should prevail and be observed as to certain matters specified in the section, as might be in force for the time being under the law of bankruptcy with respect to a bankrupt's estate. Considerable difficulty arose in determining

(1) [1906] 2 Ch. 584, 592.

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which of the bankruptcy rules were applied by means of this section, and the cases dealing with that difficulty are referred to by Stirling J. in *In re Heywood.* (1)

The Companies Act, 1883, gave priority in the winding up of companies to certain debts but not to rates. The Bankruptcy Act, 1883, s. 40, gave priority to the debts therein catalogued. Subsequently the Preferential Payments in Bankruptcy Act, 1888, after giving in s. 1, sub-s. 1, the same catalogue or a similar catalogue of preferential debts to that contained in the Bankruptcy Act, 1883, provided by s. 1, sub-s. 6, that " This section shall apply, in the case of a deceased person who dies insolvent, as if he were a bankrupt, and as if the date of his death were substituted for the date of the receiving order." Sect. 3 then provided that " This Act shall apply only in the case of receiving orders and orders for the administration of the estates of deceased debtors according to the law of bankruptcy made and windings up commenced after the commencement of this Act." In *In re Heywood* (1) it was contended that s. 3 limited the operation of the Act to receiving orders, orders under s. 125 of the Bankruptcy Act, 1883, and the winding up of companies. Stirling J. did not take that view, and held that the true effect of s. 3 was to provide that not every administration in bankruptcy or every winding up was to be affected by the Act, but only those where an order had been made after the period fixed for the commencement of the Act. He held that by the combined effect of s. 1, sub-s. 6, of the Preferential Payments Act, 1888, and s. 10 of the Judicature Act, 1875, the limitation imposed by s. 3 of the Act of 1888 had been imported into the administration of estates by courts of equity; in other words, the rule introduced into bankruptcy by the Act of 1888 would apply only where the date of the death occurred after the commencement of the Act.

The Preferential Payments Act, 1888, is now repealed, and the statutory law upon this matter is contained in the Bankruptcy Act, 1914. Sect. 33, sub-s. 1, provides that in the distribution of the property of a bankrupt there shall

(1) [1897] 2 Ch. 593.

be paid in priority to all other debts the particular preferential debts therein mentioned, and sub-s. 7 provides that subject to the provisions of the Act all debts proved in the bankruptcy shall be paid pari passu.

Sub-s. 5, which is an exact reproduction of s. 1, sub-s. 6, of the Preferential Payments Act, 1888, provides that "This section shall apply, in the case of a deceased person who dies insolvent, as if he were a bankrupt, and as if the date of his death were substituted for the date of the receiving order." Sect. 151 provides that: "Save as provided in this Act, the provisions of this Act relating to . . . . the priorities of debts . . . . shall bind the Crown."

There is no similar section to s. 3 of the Preferential Payments Act, 1888, and the point that I have to determine is whether the apparently general words of s. 33, sub-s. 5, of the Bankruptcy Act, 1914, are to be applied according to their full verbal meaning, or whether, this being merely a consolidation Act, they are to be given the same effect which for many years has been believed to be the effect of the similar section in the Preferential Payments Act, 1888. It is clear that the sum involved in this summons is not made a preferential payment or a preferential debt by s. 33, sub-s. 1, because that provision is in this case limited to income tax assessed up to April 5 next before the date of the insolvent's death. It has long been the rule that prima facie a consolidation Act must be construed as intended only to consolidate the law as previously existing and, unless the Court is obliged, such an Act ought not to be construed as creating a large and substantial change in the common law in respect of a matter to which the title of the Act does not really apply at all.

The effect of *In re Heywood* (1) and the practice under the Preferential Payments Act, 1888, have been to apply the provisions of that Act to the estate of deceased insolvents only in cases where an administration order has been made either in bankruptcy or in Chancery, where s. 10 of the Judicature Act has been held to apply. The creditor contends that s. 33, sub-s. 5, of the Bankruptcy Act,

(1) [1897] 2 Ch. 593.

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1914, is perfectly general, and ought to be given effect to according to its precise language. I am very much pressed with that argument, and if it had not been for the practice and the decisions under the exactly similar sub-section of the Preferential Payments Act, 1888, I should have felt bound to give effect to it, notwithstanding the fact that the Bankruptcy Act, 1914, is a consolidation Act. But it is the fact that different rules of administration have applied according to whether the estate in question is being administered by the Court or not. That is clear from the terms of s. 10 of the Judicature Act, 1875, and from the practice that has grown up under it.

In these circumstances, having regard to the decision in *In re Heywood* (1), I feel bound, though with considerable doubt, to hold that s. 33, sub-s. 5, of the Bankruptcy Act, 1914, must be deemed to apply only to the cases in which the similar sub-section of the Preferential Payments Act, 1888, had previously been held to be applicable. The sum of 577*l.* in question must therefore be paid in full in preference to the other debts of the estate.

Solicitors : *Johnson, Weatherall & Sturt; Solicitor for Inland Revenue; Woodcock Ryland & Parker.*

(1) [1897] 2 Ch. 593.

G. R. A.

In re GROVE.

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P.O. LAWRENCE J.

1918

Dec. 13.

[1918 G. 1267.]

Will—Legacies to married Daughters on Condition—Condition, whether precedent or subsequent—Exemption—Restraint on Anticipation removed.

A testator who died in 1918 by his will made in 1911 gave his residuary estate upon trust for his son and five daughters equally, and settled the share of each daughter upon usual trusts for her and her issue—the daughter taking a life interest restrained from anticipation and no life interest or power of appointment being given to a husband—with a gift over in default of issue to the son and the other daughters; and the testator declared that the bequest to each daughter was upon the condition that she within three months after his death settled her interest under her mother's marriage settlement upon similar trusts, and that upon her failing to do so her share in his residuary estate should "therefrom cease" and go over to the son and other daughters.

Three of the daughters had married with the testator's concurrence before the date of his will, and each of them on her marriage had settled her interest under her mother's marriage settlement upon trusts for herself and her husband respectively for life, she being restrained from anticipation, with power for them jointly or for the survivor to appoint to their issue, and in default of appointment upon usual trusts for their children with a gift over in default of issue for her statutory next of kin. The testator was a party to two of these settlements. On the question whether the married daughters were bound by the condition:—*Held*, that the condition was a condition subsequent, and that the married daughters, having on their marriage in the testator's lifetime with his concurrence settled their interests under their mother's marriage settlement, were exempt from the performance of the condition. But the Court removed the restraint on their life interests under their marriage settlements so that they might, if so advised, assign to trustees any interest they had at the testator's death in their mother's marriage settlement.

The analogy of the principle of *In re Park* [1910] 2 Ch. 322—a case of a condition in restraint of marriage—applied.

Adjourned Summons.

H. L. Grove by his will dated October 25, 1911, appointed the Public Trustee the executor and trustee thereof, and, after making certain specific and pecuniary bequests and after directing the sale, conversion and investment of the residue of his real and personal estate, gave his residuary trust estate

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to his trustee, subject to the payment thereout of certain annuities, in trust for his son and five daughters (naming them) equally, and the testator settled the share of each daughter upon trust for her for life for her separate use during coverture without power of anticipation, but with power nevertheless for each daughter (except his daughters Mabel Dixon and Edith Heywood) to appoint by deed or will a life interest to any husband who might survive her, and after the decease of each daughter and subject to any such appointment in trust for the issue of such daughter as she should by deed or will appoint, and in default of such appointment in trust for the children of such daughter at twenty-one or marriage in equal shares with a gift over in default of such issue as any such daughter (other than Mabel Dixon and Edith Heywood) should by deed or will, whether covert or discovert, appoint, and in default of such appointment in trust for his other children who should attain the age of twenty-one years or being females marry under that age. And the testator declared that "the above residuary bequest to my said daughters is conditional upon such daughters within three months after my decease irrevocably transferring to trustees their respective interests under the indenture of trust settlement executed by their mother, then Elizabeth Donaldson Scott, in anticipation of her marriage with me, the same to be held by such trustees upon the same trusts as are hereinbefore declared respecting my said residuary trust estate, and that in the event of any or either of my said daughters failing or refusing to execute such transfer as aforesaid the interest of such daughter making such failure or refusal in my said residuary estate shall therefrom cease," and his said trustee should stand possessed of the share of such daughter upon trust for his son and such of his other daughters as should have executed such transfer as aforesaid.

The testator died on September 23, 1918.

The testator had married Elizabeth Scott Donaldson in the year 1862, and by their marriage settlement made in Scotch form her personal estate was settled upon trust for her for life and after her death for the testator for life, and subject

thereto upon trust for the children of their marriage who being sons attained the age of twenty-one years or being daughters attained that age or married.

There was issue of this marriage two sons and five daughters, all of whom attained the age of twenty-one years. One of the sons died without issue in the lifetime of the testator.

The testator's wife died in the year 1879.

Three of the daughters married with the concurrence of the testator and before the date of his will—namely, Norah, who married G. Pollard in September, 1890; Mabel, who married W. Dixon in November, 1895; and Edith, who married F. Heywood in September, 1906; and each of them on her marriage settled her reversionary share or interest under her mother's marriage settlement upon trusts for herself for life without power of anticipation, and after her death for her husband for life if he should survive her, and after the death of the survivor as the husband and wife should by deed jointly appoint, and in default of such appointment as the survivor should by deed or will appoint, and in default of such appointment upon trust for the children of the marriage who being sons should attain twenty-one or being daughters should attain that age or marry, in equal shares, and in default of any child attaining a vested interest upon trust for the daughter absolutely if she should survive her said coverture, but if she should die during her said coverture then upon such trusts as the daughter should by will appoint, and in default of such appointment for her statutory next of kin as if she had died possessed thereof intestate and without having been married. Two of these settlements contained the usual covenant to settle any after-acquired property of the wife to which she should become entitled during her coverture. The testator was a party to the marriage settlement of his daughters Mabel Dixon and Edith Heywood.

The testator's residuary trust estate amounted to about 7000*l.*, and the trust funds of his wife's marriage settlement also amounted to about the same sum.

On November 23, 1918, the Public Trustee issued a summons to determine (1.) whether the testator's married daughters

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were respectively entitled to a settled share in the testator's residuary estate notwithstanding that they had respectively by their marriage settlements in the testator's lifetime settled their respective shares in the trust funds of their mother's marriage settlement, and were unable to perform the condition imposed upon each of them by the testator's will; (2.) whether the condition was wholly void so far as it related to the married daughters, or whether it was binding upon them to any and what extent; and (3.) whether, if the condition was valid and binding upon them, the same had been substantially and sufficiently performed by them respectively by the settlements executed by them respectively on their marriage.

The two unmarried daughters were willing to settle their respective shares under their mother's marriage settlement in accordance with the condition imposed upon them by the testator's will.

R. J. A. Morrison for the plaintiff.

Ashton Cross for the married daughters. In the first place, the condition is a condition subsequent because the daughters take immediate vested interests and have three months in which to perform the condition; secondly, the married daughters are exempt from the performance of the condition because at the date of the testator's death its performance was impossible by the act of the testator himself, and not through any act or default of the daughters, and therefore the condition is void and the gift to them remains good: *Walker* v. *Walker* (1); *Collett* v. *Collett*. (2) He knew of their marriage settlements, and was himself a party to two of them. Thirdly, the daughters substantially fulfilled the condition in the testator's lifetime with his concurrence. There is no case in the books like this, but it is submitted that the principle of the decisions on conditions in restraint of marriage apply, and the observation of Parker J. in his judgment in *In re Park* (3) are in my favour. Lastly, if the condition applies, they have only to convey to trustees

(1) (1860) 2 D. F. & J. 255. (2) (1866) 35 Beav. 312, 316.
(3) [1910] 2 Ch. 322, 327.

the interest they have at the testator's death in their mother's marriage settlement, and they had none, because they had assigned that interest to trustees on their marriage, or, at most, they have a life interest therein restrained from anticipation, and the Court can remove the restraint to enable them to assign that interest to trustees.

E. Brydges for the son and unmarried daughters. It is obvious that the testator must have had an object in imposing the condition which appears from the will itself, and on comparing the trusts of the marriage settlements with the trusts of the will it is evident that he wished to cut out of the marriage settlements the life interests (with one exception) and powers of appointment given to the husbands; and there is also a difference in the ultimate trusts, and he may have thought that the settlements could be altered. In the next place, the condition is a condition precedent, and therefore, even if it cannot be performed, the gift to the married daughters fails and goes over: *In re Emson.* (1) But if it is a condition subsequent the authorities show that it must be strictly and literally complied with, and is only dispensed with in two cases —namely, where it is rendered impossible by the act of God, as in *Walker* v. *Walker* (2), or where it is impossible by some act of the testator himself and not by some act or default of the person to whom the gift is made, as in *Collett* v. *Collett*. (3) Here the married daughters have by their own act rendered the condition impossible, and therefore the gift to them fails and goes over. With regard to the restraint on anticipation, it is submitted that the married daughters, having parted with their interests under their mother's marriage settlement, cannot do what the testator intended by this condition. In *Robinson* v. *Wheelwright* (4), which was affirmed on appeal (5), the Court declined to release a married woman from the restraint although it was manifestly for her benefit to do so. I do not, however, cite the case for that purpose, but as showing that a condition imposed by a testator must be strictly complied

(1) (1905) 93 L. T. 104.
(2) 2 D. F. & J. 255.
(3) 35 Beav. 312, 316.
(4) (1855) 21 Beav. 214, 219.
(5) (1856) 6 D. M. & G. 535, 545.

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with, and also for the illustration given in the Court of Appeal by the Lord Chancellor where he says: "If a testator were to devise a real estate to the use of trustees in fee in trust to pay over the rents to A. B. for life with remainder to her first and other sons in tail with no power of sale and exchange, and afterwards a second testator were before A. B. had issue to devise another estate of double the value to the same uses and on the same trusts on condition that the estate first devised should be within a year conveyed to some other uses, this, though obviously beneficial to A. B. and her issue, could not be accomplished." It is submitted that the present case falls within that proposition.

P. O. LAWRENCE J., after stating the facts and reading the proviso in the will, said: The question is whether, owing to this proviso, the three married daughters take no share in their father's estate, and the whole of it goes to their brother and two unmarried sisters, or whether it can in any way be said that the condition has been or can be complied with or can be dispensed with. The first point is whether this is a condition precedent or a condition subsequent. Mr. Brydges, in arguing the former, cited *In re Emson*. (1) If that case applied I should follow it, but in my judgment it is essentially different. There the gift was made to a certain charity subject to the trustees of the will being elected to the Board of Management of the charity, and Kekewich J. held, and I respectfully agree with him, that the condition was a condition precedent. In the present case I am of opinion that the condition is a condition subsequent. The gift to the children takes effect at once upon the death of the testator, and the condition is that within three months after his death they are to transfer their interests under the marriage settlement of their mother, and then, if they fail or refuse to do that, "therefrom"—i.e., from such failure or refusal—they shall cease to have any interest in his residuary estate, and the trustee is to stand possessed of it for other persons. In my judgment that is plainly a condition subsequent. But, Mr. Brydges

(1) 93 L. T. 104.

said, granted this is a condition subsequent, yet it must be performed unless the act of God has intervened or unless the testator himself has done something which makes it impossible for the legatees to comply with the condition; and here there is no act of God, and the only act that has made the performance of the condition impossible is the act of the legatees themselves, and therefore the condition, though a condition subsequent, must be strictly adhered to, and being impossible, the gift fails. On the other hand, Mr. Ashton Cross argued that the testator has himself dispensed with the condition by being a party to the settlements of his daughters, Mrs. Dixon and Mrs. Heywood, and by reason of his knowledge (which must be presumed) of the settlement by Mrs. Pollard. He further argued that the condition, if not dispensed with by the testator, had been substantially complied with by the legatees in the lifetime of the testator, and therefore the gift to them ought to take effect. Further, he argued that on the construction of the condition itself all that the daughters have to do is to convey their respective interests existing at the death of the testator under the settlement of their mother; and inasmuch as they have already conveyed that interest to trustees and have merely retained or taken under the assignment a life interest restrained from anticipation they have really nothing further to convey, and that therefore, so far as they are concerned, they are exempted from a fulfilment of the condition; and further, that the only interest, if any, which they had under the settlement of their mother at the death of the testator was a life interest restrained from anticipation, and that if they were to assign that they would comply with the condition. My attention has been called to several authorities. I will deal first with *Robinson* v. *Wheelwright* (1), upon which Mr. Brydges mainly relied. In that case a testator gave a legacy to a married woman on condition that she conveyed to certain persons an estate devised to her by another testator for her separate use without power of anticipation, and the Court was asked to dispense with the restraint on anticipation so as to enable her to comply with the condition. The Court

(1) 21 Beav. 214, 221; on appeal, 6 D. M. & G. 535, 545.

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held that they could not dispense with the restraint on anticipation though it was clearly to her benefit to do so. Mr. Brydges cited the case for the expressions used both by the Master of the Rolls in the court below and by the learned judges in the Court of Appeal with regard to the necessity of complying strictly with a condition imposed by a testator. The Master of the Rolls at first thought that a mere illusory conveyance might be sufficient to comply with the condition, but says that reflection caused him to change that view; and that in his judgment not only the cases but the principles relating to conditions require that they should be strictly and literally performed; and later he says: "It may be said, that this is a very capricious will, and that the Court would discountenance a testator's inserting into a will a sort of legacy, which holds out a promise to the ear and breaks it to the hope, and frustrates the expectation which it creates. I concur with the observation, but I cannot deal with a will of this description in any other way than by applying such rules of law as are strictly applicable to it." In the Court of Appeal the Lord Chancellor and Turner L.J. affirmed the decision, and the Lord Chancellor gave an example which Mr. Brydges quoted to me and on which he relied. In my judgment this case really only decides that you must comply with a condition strictly when it is imposed by a testator as a condition upon which you are entitled to take a legacy. On the other hand, Mr. Ashton Cross cited *In re Park* (1); *Walker* v. *Walker* (2); and *Collett* v. *Collett*. (3) Mr. Brydges does not question the decision in *Collett* v. *Collett* (3) in any way, but says it is inapplicable because it comes under the admitted proposition that where a condition subsequent is rendered impossible owing to the act of God there need be no compliance with it. As regards *Walker* v. *Walker* (2) he says he is not concerned to question that because it comes under the other proposition that the testator has himself rendered the condition impossible of performance by his own act in his lifetime. So those two cases he says, and I agree with him, do not assist in solving the

(1) [1910] 2 Ch. 322, 326. (2) 2 D. F. & J. 255.
(3) 35 Beav. 312.

problem now before the Court. With regard to *In re Park* (1) Mr. Brydges says that it is one of the class of cases dealing with consent to marriage which are numerous and really are not applicable to the present case at all. Mr. Ashton Cross, however, relies upon certain observations in the judgment of Parker J. which he contends go further than mere cases of consent to marriage. I am not sure, however, that Parker J. is not dealing entirely with cases that depend upon consent to marriage; the passage that Mr. Ashton Cross relies upon is where Parker J., after dealing with the ratio decidendi of *Clarke* v. *Berkeley* (2), says: "If, then, that is the principle, and considering the matter quite apart from the codicil, any children of the son born during the testator's lifetime of the marriage of which the testator had approved in his lifetime would, I think, clearly have been entitled to the provision made for them by the will in the event of their attaining twenty-one years of age; subject, of course, to the interest which had previously been given to the son. In other words, the condition imposed, which, of course, is prima facie a condition applying only to marriage after the testator's death, would, for the purpose of seeing who is to be beneficially interested under the will, have been taken to have been fulfilled, and the children would come in." Then a little later he says: "I think there are some remarks in some of the cases quoted which suggest that the true principle is not that of considering that the condition has been fulfilled, but that the child, or other persons entitled under the will in the event of the child marrying, with or without consent, are exempt from the condition altogether, so that the will must be read as if there were no condition. But, however you put it, it appears to me that in the present case, the condition having been in effect fulfilled, or having been in effect struck out by reason of the marriage in the lifetime of the testator, both the children of the son as to whose marriage the condition applied and the persons entitled in default of children must come in under the terms of the will on the principle of the cases to which I have referred. There is another and shorter way of

(1) [1910] 2 Ch. 322, 326, 327.

(2) (1716) 2 Vern. 720.

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putting it, and I am not sure that that alone would not be sufficient for the case. It is clear on the cases that the marriage in the lifetime of the testator may be a marriage to which the condition refers; and, at any rate in the present case, it appears that the son did marry, and that he had no children." Now although it is perfectly true, as Mr. Brydges pointed out, that cases as regards marriage stand on a distinct and separate footing, yet I think they do afford some kind of analogy in the present case, because it is a question of daughters settling interests which belonged to them absolutely in order to protect themselves; and I think the analogy lies in this, that both the provision requiring consent to marriage and the provision requiring the daughters to settle their property are intended solely for the purpose of safeguarding the daughters against husbands who are unsuitable and might take advantage of their position. I cannot bring myself to believe that the testator, knowing that his three married daughters had settled their interests, nevertheless intended them to take nothing under his will in spite of their being named as beneficiaries. He must be taken to have known the effect of the settlements, and the settlements having taken place in his lifetime, I have come to the conclusion that on the analogy of the principle applied by Parker J. in *In re Park* (1) the daughters who have executed settlements in the testator's lifetime are exempt from this condition. It is quite true that the trusts of these settlements are not absolutely identical with the trusts of the will, and in one particular they are opposed to the provisions of the will which excludes two of the husbands of the daughters from taking any interest. Notwithstanding this, however, I come to the conclusion that, the settlements having in the case of Mrs. Dixon and Mrs. Heywood been executed with the concurrence of the testator, and in the case of Mrs. Pollard —whose husband, by-the-bye, is not excluded under the will—with this knowledge, the married daughters must be taken to have complied with or are exempt from the condition. But even if I am wrong in that view, in

(1) [1910] 2 Ch. 322, 326, 327.

my judgment the true construction of this condition is that all that is required of the married daughters is that they shall irrevocably transfer such interests as they have under the settlement of their mother at the date when the will becomes operative. I do not think that the testator ever intended to impose such a condition as to make it impossible for them to take any part of the residue of his estate. The words of the condition are " their respective interests under the indenture of trust settlement " and if the true interpretation is that which I put upon it—i.e., their interests at the date of the testator's death—then this follows, either they have no interest under that settlement within the meaning of the will because they had assigned it all to the trustees of their own marriage settlements, and their life interests therein were not interests under their mother's marriage settlement but under their own, or at most their interests are interests for life restrained from anticipation, and those are the interests they ought to convey. Although it would seem to be useless for them to convey their life interests restrained from anticipation to trustees upon trust for themselves for life restrained from anticipation, yet as the three months have nearly expired I remove the restraint, and give them leave for what it is worth to execute such assignment as they may be advised to make to trustees, who of course may be their own settlement trustees.

Solicitors for all parties : *Powell, Rogers & Merrick.*

H. L. F.

C. A. 1919 Jan. 16.

HARE SPINNING COMPANY, LIMITED *v.* LEIGH AND OTHERS.

Lancaster Palatine Court—Practice—Joinder of different Causes of Action—Relief claimed against several Defendants—Palatine Court Rules, Order XVI., *rr.* 1, 4; *Order* LVII., *r.* 2.

Under Order XVI., r. 1, of the Supreme Court Rules, before October, 1896, separate causes of action against different defendants could not be joined, but at that date the rule was altered so as to permit, under certain restrictions, such a joinder. Order XVI., r. 1, of the Rules of the Lancaster Palatine Court, which was identical with Order XVI., r. 1, of the Supreme Court as it originally stood, was not so amended; but Order LVII., r. 2, of the Palatine Court Rules provides that: "If in any case it shall be found that the procedure and practice in respect of actions, or of other matters in the court is not in any particulars fully and adequately provided for by the Rules for the time being in force in the court, the course of procedure and practice for the time being adopted in the Chancery Division of the High Court of Justice shall be followed in those particulars."

In an action in the Palatine Court, where separate causes of action against several defendants were joined, one of the defendants applied to have his name struck out for misjoinder:—

Held, that Order LVII., r. 2, did not automatically alter Order XVI., r. 1, of the Palatine Court Rules, so as to introduce the practice of the High Court; and that the applicant was therefore entitled to have his name struck out as a defendant to the action.

APPEAL from a decision of the Deputy V.-C. of the County Palatine of Lancaster refusing an application by the defendants, the Union Bank of Manchester, Ltd., that their name as defendants to the action might be struck out.

The action was brought by the plaintiff company, which was in liquidation, against the defendants, Leigh, John Leigh, Ltd., certain other persons, and the Bank. The claim against the defendants other than the bank was for a declaration inter alia that those defendants had wrongfully combined or conspired together for the purpose of defrauding the plaintiff company. It was alleged that valuable contracts had been improperly obtained from the plaintiff company by Leigh or his company, and that a course of dealing had been carried out by Leigh and his co-defendants (other than

the bank) whereby the plaintiff company was defrauded and ultimately forced into liquidation. The only claim against the defendant bank was, as alleged in paragraph 28 of the statement of claim, that certain debentures (forming the sixth series) issued by the plaintiff company to the bank to secure an overdraft by the company were invalid under s. 212 of the Companies (Consolidation) Act, 1908.

The relief claimed by the plaintiff company was under two heads—namely, (1.) Damages and other relief claimed against all the defendants (except the bank) founded on the allegations in the statement of claim, other than the allegations in paragraph 28 as to the issue of the sixth debentures, and based as regards all the defendants other than the bank on a charge of alleged conspiracy to defraud the plaintiff company, and, as regards the four defendants who were also directors, also on misfeasance. (2.) Relief claimed only against the defendant bank founded on paragraph 28 of the statement of claim—namely, that the issue of the sixth debentures was invalid, and consequential relief.

It was contended by the plaintiff company before the Deputy V.-C. that the damages claimed against the defendants (other than the bank) included a claim for damages in respect of the matters alleged in paragraph 28 of the statement of claim with reference to the issue of the sixth debentures, and the plaintiff company asked for leave to amend by adding to the relief claimed against the defendants (other than the bank) a claim for damages in respect of the matters alleged in paragraph 28 of the statement of claim.

The Deputy V.-C. allowed the amendment and treated the case as if such an amendment had been made.

The defendant bank took out a summons to have the name of the bank struck out as defendants on the ground that the cause of action against them was improperly joined with those against the other defendants, there being no common question of law or fact between the plaintiff company and the two sets of defendants. The Deputy V.-C. refused the application. Under Order XVI., r. 1, of the Supreme Court Rules, as they stood previous to October 26, 1896, having

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regard to the decision of the House of Lords in *Smurthwaite* v. *Hannay* (1) and *Sadler* v. *Great Western Ry. Co.* (2) the joinder of the separate and distinct causes of action against the bank and the other defendants would not have been permissible, but on that date Order XVI., r. 1, was altered so as to allow such a joinder. The rule of the Palatine Court, corresponding to Order XVI., r. 1, of the Supreme Court Rules, was identical with the latter rule as it existed before the alteration in 1896, but Order LVII., r. 2, of the Palatine Court Rules provided that "If in any case it shall be found that the procedure and practice in respect of actions, or of other matters in the Court is not in any particulars fully and adequately provided for by the rules for the time being in force in the Court, the course of procedure and practice for the time being adopted in the Chancery Division of the High Court of Justice shall be followed in those particulars."

The defendant bank appealed.

Maugham K.C. and *F. J. Kerr* for the appellants. The cause of action alleged against the bank is not properly joined with the charges of fraud against the other defendants. The relief claimed against the separate defendants does not arise out of the same transaction or series of transactions, and is not such that if the plaintiff had brought separate actions a common question of law or fact would arise.

Under Order XVI., r. 1, of the Supreme Court Rules as construed by the House of Lords in *Smurthwaite* v. *Hannay* (1) and *Sadler* v. *Great Western Ry. Co.* (2) it is clear that these two causes of action could not have been properly joined; and although that rule was extended in October, 1896, so as to permit such a joinder, Order XVI., r. 1, of the Palatine Court Rules, which governs this case, has not been amended in the same way.

Order LVII., r. 2, of the Palatine Court Rules, which provides that the procedure and practice of the Chancery Division shall be adopted in the Palatine Court where the procedure and practice of that Court is not adequately provided for

(1) [1894] A. C. 494. (2) [1896] A. C. 450.

by the Palatine Rules, does not apply here, because in this particular the practice is adequately provided for, though it differs from that of the High Court.

But even if the case were governed by Order XVI., r. 1, of the Supreme Court Rules, as altered in 1896, the plaintiffs would not come within it: *Gower* v. *Couldridge* (1); *Stroud* v. *Lawson* (2); *Frankenburg* v. *Great Horseless Carriage Co.* (3); *Compania Sansinena* v. *Houlden Bros. & Co.* (4) Here the alleged causes of action against the bank and the other defendants are wide apart. The only question between the plaintiffs and the bank may be determined in the winding up without any action being brought against the bank.

The case may be tested by asking whether if the action had been brought primarily against the bank the cause of action against the other defendants could have been joined with that against the bank. Or if two separate actions had been brought, would consolidation have been allowed?

[*Pope* v. *Hawtrey* (5) and *Sandes* v. *Wildsmith* (6) were also referred to.]

Hon. F. Russell K.C. and *A. G. Roby* for the respondents.

The decision appealed from is correct. Separate causes of action may be joined if the relief claimed arises out of the same transaction or series of transactions, or if a common question of law or fact arises: Rules of the Supreme Court, Order XVI., r. 1. The issue of the sixth debentures is one step in the series of transactions alleged against the defendants other than the bank. It is admitted that the cause of action against the bank is totally different from that against the other defendants, but there is a common set of circumstances. It is not necessary that every defendant should be interested in the whole set of circumstances: *Stroud* v. *Lawson*. (7)

It is said that under Order XVI., r. 5, the Court has a discretion in the matter, but this is not a case for the exercise of it in

(1) [1898] 1 Q. B. 348.
(2) [1898] 2 Q. B. 44.
(3) [1900] 1 Q. B. 504.
(4) [1910] 2 K. B. 354.
(5) (1901) 85 L. T. 263.
(6) [1893] 1 Q. B. 771.
(7) [1898] 2 Q. B. 44, 54.

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the appellants' favour, having regard to the fact that they applied for and obtained security for costs: *Thomas* v. *Moore* (1); *Oesterreichische Export A. G.* v. *British Indemnity Insurance Co.* (2); *Times Cold Storage Co.* v. *Lowther & Blankley* (3); *In re Beck.* (4)

No doubt under the Palatine Court Rules as they stand there is no provision enabling a plaintiff to join separate causes of action against separate defendants, but the effect of Order LVII., r. 2, is to introduce the practice of the High Court where that of the Palatine Court is not adequately provided for in any particular. That applies to any matter as to which the Palatine Court Rules are silent, so that this case is governed by Order XVI., r. 1, of the Supreme Court Rules as altered in 1896: *Birkdale Park Land Co.* v. *Weld.* (5)

Maugham K.C. in reply. The Palatine Court Rules are not silent on this matter. See Order XVIII., which provides for joinder of causes of action. Under the Chancery of Lancaster Act, 1850 (13 & 14 Vict. c. 43), there is power to adopt and modify any rules and orders made or to be made by the High Court. See Bennett's Jurisdiction and Practice of the Chancery of the County Palatine of Lancaster, p. 40. No alteration of Order XVI., r. 1, of the Palatine Rules has been effected in this particular. The separate causes of action in this case are improperly joined.

There is no necessity for any action against the bank. Any relief to which the plaintiffs are entitled against the bank can be obtained by application in the winding up.

Alexander Grant K.C. for the defendant Leigh, and *F. E. Bradley* for other defendants, took no part in the arguments.

SWINFEN EADY M.R. This is an appeal from an order of the Deputy V.-C. of the County Palatine whereby he refused to strike out one of the defendants, the Union

(1) [1918] 1 K. B. 555.
(2) [1914] 2 K. B. 747.
(3) [1911] 2 K. B. 100, 107.
(4) (1918) 118 L. T. 629, 631.
(5) (1902) Noted in Bennett's Jurisdiction and Practice of the Chancery of the County Palatine of Lancaster, p. 143.

Bank of Manchester, Ltd., from the action. The bank appeals from that refusal.

In the action the Hare Spinning Co., Ltd., in liquidation is plaintiff, and there are numerous defendants other than the bank, some of whom are alleged to have acted as nominees of the defendant Leigh, and on his behalf in respect of some of the transactions complained of in the action. So far as the defendants other than the bank are concerned, the statement of claim alleges a conspiracy on the part of the various defendants to defraud the plaintiff company, to provide that the defendant Leigh or his company should by means of nominees of his obtain control of the Hare Spinning Co., Ltd., then a going concern, with a view of injuring, and ultimately wrecking the undertaking of the plaintiff company to the intent that Leigh or his company through a nominee might acquire the property and assets of the Hare Spinning Co. And it alleges various transactions whereby valuable contracts were improperly obtained from the Hare Spinning Co. for the benefit of John Leigh or his company, contracts for the purchase of the cotton waste of the plaintiff company. It also alleges transactions with regard to the sale of cotton by Leigh or his company to the Hare Spinning Co. at excessive prices, the sale of cotton not required, or of an inferior quality or character to that really required. Putting it in a few words, it alleges a course of dealing by Leigh or the Leigh Co. by means of obtaining nominees of their own on the board of the Hare Spinning Co., Ltd., whereby the Hare Spinning Co. was defrauded and ultimately brought to ruin, and its property and assets sold to Leigh and his company, a new company, in which they hold the share capital, being formed to acquire, and which has acquired, the old undertaking. That is the general nature of the action brought by the plaintiff company against the defendants other than the bank.

The claim against the bank is very simple. It is said that in February, 1914, an issue of debentures was made by the plaintiff company of 14,000*l.*, that is to say, fourteen debentures of 1000*l.* each, being the sixth series of such

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debentures constituting a floating charge on the assets of the company. The case is that these debentures were issued within three months of the winding up of the company, and therefore that under s. 212 of the Companies (Consolidation) Act, 1908, they must be deemed to be invalid except to the amount of any cash paid to the company at the time or subsequent to the creation of and in consideration for the charge, unless it is proved that the company immediately after the creation of the charge was solvent. Within three months of February 19, 1914—namely, on April 7, 1914—a petition was presented against the company upon which a winding-up order was made on May 19. So that the only case against the bank is that certain debentures which were issued to the bank come within the provisions of s. 212, and except so far as the bank is able to show that they gave consideration at, or subsequent to, the issue of the debentures and paid cash, or unless it appears that the company was solvent, then its debentures are not binding upon the assets of the company. There is no allegation that the issue of the debentures in any way increased or affected the indebtedness of the company to the bank; but the case against the bank is merely that under s. 212 of the statute the debentures must be deemed to be invalid. The bank is not alleged to be in any way implicated or concerned in any of the transactions sought to be impeached in the action. It is not suggested that the bank was a party to the conspiracy which is very plainly alleged or to any of the acts of misfeasance of which full details are set out in the statement of claim. The case against the bank is entirely separate and distinct from that against the remaining defendants, and moreover any claim against the bank in respect of these debentures lies within an exceedingly narrow compass, and raises a short point upon which the evidence would obviously be very short indeed: whereas the case against the other defendants extends over a considerable interval of time and embraces transactions of considerable complication and magnitude.

Now, it is not disputed at all—it could not be on the face

of the statement of claim—that different causes of action are combined in the present proceedings. Although there is only one plaintiff, the company in liquidation, the action comprises two quite distinct causes of action, one against the bank with which the other defendants are not concerned; and the bank is not concerned with the case against all the remaining defendants. So that there are two entirely separate and distinct causes of action. The bank takes the point that those two causes of action cannot be combined, and they are entitled to ask to be dismissed from the action.

The plaintiff seeks to justify combining these causes of action in this way.

The action is brought in the Palatine Court, and Order XVI., r. 1, of the Palatine Court Rules is in the same form as Order XVI., r. 1, of the Supreme Court Rules before the alterations that were introduced in October, 1896. The effect of the decisions in *Smurthwaite* v. *Hannay* (1) and *Sadler* v. *Great Western Ry. Co.* (2) was that separate causes of action could not be combined under the old rule. Since then the rule has been extended and a plaintiff is now able to combine separate causes of action. The rule of the Palatine Court remains as originally framed, and has not been altered. If that were all, then it must be conceded that the true interpretation of the rule is governed by the decisions to which I have just referred, and the contention that the plaintiff was entitled to combine these two causes in the present action could not be sustained.

But it is said that the effect of Order LVII., r. 2, of the Palatine Court Rules is such that although Order XVI., r. 1, of those rules has not in terms been amended it must now be treated as if it were amended for the purpose of introducing the alteration that was introduced into the Supreme Court Rules in October, 1896. [The Master of the Rolls then read Order LVII., r. 2, of the Palatine Court Rules, and continued:] The contention of the respondents comes to this, that the effect of that order is automatically to introduce into the Palatine Court Rules the alterations that are made from time to time in the rules

(1) [1894] A. C. 494.

(2) [1896] A. C. 450.

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of the Supreme Court, if the judge shall from time to time, in dealing with each matter as it arises, find that the procedure and practice is not fully and adequately provided for by the rules for the time being in force. Now, I am quite satisfied that the operation of Order LVII., r. 2, is not to effect that automatic alteration of the Palatine Rules from time to time. The practice in the Palatine Court differs in various details from that in the Supreme Court. The rules dealing with the Palatine practice take the form that is convenient having regard to the practice of that Court. Under the Court of Chancery of Lancaster Act, 1850, to which our attention had been called, express power is given by s. 11 to adopt and modify the rules made from time to time as the rules and orders of the High Court of Chancery, which is now the High Court of Justice, are from time to time altered. There is therefore express power to make alterations in the Palatine Rules so as from time to time to adapt them to the various alterations that are made in the High Court Rules. That has not yet been done with regard to Order XVI.

In my opinion whatever the effect is, and some effect can doubtless be given to Order LVII., r. 2, it certainly does not extend to include such an alteration as was introduced into the Supreme Court Rules by the amendment in October, 1896, of Order XVI., r. 1.

We must deal with this case as being governed, as in my opinion it is, by Order XVI., r. 1, in the old form, and that being so the plaintiffs were not entitled to join these separate causes of action against the bank and the other defendants. In my opinion the proper order will be to allow the appeal and strike out the bank as defendants. There is an additional reason for doing so in the present case. I am satisfied it would not be fair to the bank to retain them as defendants in such an action as this; and, moreover, the dispute between the plaintiff company in liquidation and the bank can be readily adjusted in the winding up without the bank being parties to any action at all. The only point is: Are the bank's debentures valid to any, and to what, extent?

In my opinion this appeal ought to be allowed and the bank

struck out as defendants, leaving the action to proceed with regard to the other defendants.

SCRUTTON L.J. I agree.

EVE J. I agree. When once it is realized that the practice and procedure of the Palatine Court in relation to parties and the joinder of causes of actions are provided for by orders identically the same as were the orders of the Supreme Court prior to the alteration of Order XVI., r. 1, in October, 1896, I do not think it is competent for us to find that the procedure and practice of the Palatine Court in respect of these matters is not adequately and fully provided for by the rules.

Appeal allowed.

Solicitors for appellants: *Rawle, Johnstone & Co., for Addleshaw, Sons & Latham, Manchester.*

Solicitors for respondents: *Hyman Isaacs, Lewis & Mills, for F. O. S. Leak & Pratt, Manchester.*

Solicitors for other defendants: *Cobbett, Wheeler & Cobbett, Manchester, and T. W. Markland & Whitehead, Manchester.*

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Jan. 17, 21.

In re HARPER'S SETTLEMENT.

WILLIAMS *v.* HARPER.

[1918 H. 1244.]

Deed—Assignment of Share in Fund—Absence of Title—Subsequent Acquisition of good Title—Equitable Estoppel.

A marriage settlement made in 1864 gave the husband and wife, or the survivor, power to appoint the settled funds among the children of the marriage. In 1904 one of the daughters, on her marriage, executed a settlement which contained a recital that, under the settlement of 1864 and a deed poll executed by her parents, she was entitled in reversion expectant upon the death of the survivor of her parents (both then living) to one-third part of 6500*l.* of the trust funds of the settlement of 1864, and witnessed that the daughter assigned to trustees "all that the third part or share" to which she was entitled in reversion expectant as aforesaid. The mother survived the father and died in 1917, having by her will, made in 1916, appointed 2000*l.*, part of the funds settled in 1864, to the daughter. There was no evidence of any other appointment by deed poll or otherwise:—

Held, that the appointed sum of 2000*l.* was caught by and subject to the settlement of 1904.

The principle enunciated by Shadwell V.-C. in *Noel* v. *Bewley* (1829) 3 Sim. 103, was rightly applied in *In re Hoffe's Estate Act*, 1855 [1900] W. N. 114; 82 L. T. 556, and *In re Bridgwater's Settlement* [1910] 2 Ch. 342, but, as shown in *Smith* v. *Osborne* (1857) 6 H. L. C. 375, was misapplied in *Noel* v. *Bewley* itself, the actual decision in which is overruled.

On the marriage, on June 30, 1864, of Leonard Harper and Joanna Dorothea Dyke Troyte, an indenture of settlement, dated June 29, 1864, was executed, by which the wife settled 6000*l.* and the investments thereof upon trusts under which the wife and husband took successive interests for life. After the death of the survivor the trust fund was to be held in trust for the children of the marriage in such shares and manner as their parents should jointly appoint, and, in default of and subject to any joint appointment, as the surviving parent should by deed or will appoint, and, in default of and subject to the survivor's appointment, in trust for the children of the marriage who being sons should attain twenty-one, or being daughters should attain that age or be previously married, if more than one in equal shares.

There were nine children of the marriage—sons and daughters —all of whom attained twenty-one.

Joan Acland Harper, one of the daughters, was married in 1904 to Cecil John Troyte-Bullock, and on their marriage an indenture, dated August 23, 1904, was executed, to which they and the trustees thereof were parties.

This deed contained the following recitals :—

" Whereas a marriage has been agreed upon and is intended to be solemnized between the said Cecil John Troyte-Bullock (hereinafter called ' the husband ') and the said Joan Acland Harper (hereinafter called ' the wife ')." " And whereas, under an indenture dated the 29th day of June, 1864, and made between . . . . (1), and a deed poll under the hands and seals of the said Leonard Harper and Joanna Dorothea Dyke, his wife, the wife is entitled in reversion, expectant upon the death of the survivor of the said Leonard Harper and Joanna Dorothea Dyke, his wife, to one-third part or share of 6500*l.* of the trust funds held on the trusts of the said settlement by the therein called English trustees, which is now represented by the stocks and securities mentioned in the schedule hereto, standing in the names of Robert Williams and John Edward Acland, the present trustees of the said settlement. And whereas upon the treaty for the said intended marriage it was agreed that such settlement should be made as hereinafter expressed."

It was then witnessed that, in consideration of the marriage, the wife, as settlor, thereby assigned to the trustees " all that the third part or share to which the wife is entitled, in reversion expectant as aforesaid, of the investments and securities mentioned in the schedule," and the settlement then declared trusts of " the said share and premises hereinbefore assigned, and of the investments for the time being representing the same"—namely, to pay the income to the wife for life, and after her death upon trust for the child and remoter issue of the marriage, and in default of a child taking a vested interest, then in trust for the wife absolutely.

Leonard Harper died on October 27, 1915.

(1) The parties to the recited deed were not all given.

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Joanna D. D. Harper died on May 8, 1917. By her will, dated April 10, 1916, she, in exercise of the powers in the settlement of 1864, appointed that the trustees thereof should, after her death, hold the funds comprised therein upon trust to raise and pay thereout certain specific sums to her three daughters, including 2000*l.* to her daughter Joan Acland Troyte-Bullock, and should hold the residue of the settlement funds upon trust for such of her sons as should survive her, in equal shares.

The nine children of Mr. and Mrs. Harper all survived their parents except one son, who died in 1897.

It was in evidence in the proceedings below mentioned that in the negotiations for the settlement of 1904, in reply to inquiries made by the solicitor acting for Mr. Troyte-Bullock, as to Miss Harper bringing into the settlement her reversionary share in the trust fund subject to the settlement of 1904, Leonard Harper, her father, wrote that the share under the settlement of his marriage to which she would be "entitled on our death . . . . will not be less than 2000*l.*," and "has already been irrevocably appointed under the powers in that settlement for her sole and separate benefit"; but in a later letter Leonard Harper informed the same solicitor that he was unable to supply either the original or a copy of the deed of appointment, which, he said, had been made by his wife and himself, many years ago, of part of the trust fund amounting to 6500*l.* in favour of their three daughters in equal shares.

Inquiries were made of the trustees of the settlement of 1864, and of members of the family and others who were likely to know anything as to any such deed of appointment, but without result; except that a brother of Leonard Harper said that he remembered that many years ago there had been some talk of a deed of appointment, but that no appointment had been made.

An originating summons was taken out by the present trustees of the settlement of 1864 against the eight children of Leonard Harper and his wife and the trustees of the settlement of 1904, raising the question whether the plaintiffs,

as trustees of the former settlement, ought properly to deal with and distribute the trust funds subject to the trusts thereof as directed by and in pursuance of the appointment made or purported to be made by the will of Joanna D. D. Harper, or how otherwise the trust funds ought to be dealt with and distributed.

Owen Thompson for the trustees of the first settlement stated the facts and the question involved.

D. Donaldson Robertson for the persons beneficially entitled under the second settlement, except Joan Acland Troyte-Bullock.

Percy Wheeler for the trustees of the second settlement. The sum of 2000*l.* appointed to Mrs. Troyte-Bullock by her mother's will is subject to the trusts of the second settlement. The principle applicable is that laid down in *In re Hoffe's Estate Act*, 1855 (1); *In re Bridgwater's Settlement* (2); and *Noel* v. *Bewley* (3), that where a conveyance has been made under a defective title and the grantee subsequently acquires a good title, the Courts will make the good title available to effectuate the conveyance. Admittedly, the implied covenant for further assurance under s. 7, sub-s. (1.) E of the Conveyancing Act, 1881, only affects the subject-matter of the conveyance and does not enlarge it.

But Mrs. Troyte-Bullock, by her statement in her settlement that she was entitled to one-third of 6500*l.*, is estopped from denying the truth of the statement: *Citizens' Bank of Louisiana* v. *First National Bank of New Orleans.* (4)

[He also referred to *Smith* v. *Osborne* (5) and *Smith* v. *Baker.* (6)]

Barrett-Lennard for Mrs. Troyte-Bullock. The principle of *In re Hoffe's Estate Act*, 1855 (1) and *In re Bridgwater's Settlement* (2) does not apply. The assignment by the second settlement is not absolute in form, but is conditional on the settlor being entitled to the property under the deed

(1) [1900] W. N. 114; 82 L. T. 556.
(2) [1910] 2 Ch. 342.
(3) 3 Sim. 103.
(4) (1873) L. R. 6 H. L. 352.
(5) 6 H. L. C. 375.
(6) (1842) 1 Y. & C. Ch. 223.

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poll referred to in the recital. And she is not bound to assign what she never got under the deed poll: *Smith* v. *Osborne* (1); *Sweetapple* v. *Horlock.* (2) The decision in *Noel* v. *Bewley* (3) was overruled in *Smith* v. *Osborne* (4), but this fact was not brought to the Court's notice either in *In re Hoffe's Estate Act,* 1855 (5) or in *In re Bridgwater's Settlement.* (6) There is no sufficiently precise averment that the settlor was entitled to one-third of the old settlement funds to create an estoppel against her: *General Finance, Mortgage, and Discount Co.* v. *Liberator Permanent Benefit Building Society.* (7)

[*Lovett* v. *Lovett* (8) was also referred to.]

SARGANT J. stated the facts and the question involved, and referred to the absence of evidence of the execution of any deed of appointment prior to the settlement of 1904, and continued: The strong presumption is that Mr. Leonard Harper was under the mistaken impression that the previous intention to make an appointment had been carried out, whereas that was not the fact. However, I think I should not be justified in altogether ignoring the existence of the alleged deed poll, and, if the execution or non-execution of the deed poll made any great difference, I should not be justified, on the evidence before me, in deciding the question which has been raised, and should feel bound to direct some inquiry to be made. But what the trustees of the settlement of 1904 say is that, even on the assumption that there was no such appointment by deed poll, the terms of the settlement, by which the settlor assigned her third share in 6500*l.*, are sufficient to catch the smaller sum of 2000*l.* appointed by her mother's will. If so, the difference between the one-third settled and the sum appointed by the will is so small that I do not think the expense of a formal inquiry should be incurred. And notwithstanding Mr. Barrett-Lennard's able argument, I have come to the conclusion that the share in the trust funds under the settlement of 1864 appointed by Mrs. Harper's

(1) 6 H. L. C. 375, 397.
(2) (1879) 11 Ch. D. 745.
(3) 3 Sim. 103.
(4) 6 H. L. C. 375, 398.
(5) [1900] W. N. 114; 82 L. T. 556.
(6) [1910] 2 Ch. 342.
(7) (1878) 10 Ch. D. 15.
(8) [1898] 1 Ch. 82.

will to Mrs. Troyte-Bullock is caught by the settlement of 1904.

The principle is stated in *In re Hoffe's Estate Act*, 1855 (1) and *In re Bridgwater's Settlement* (2), and the head-note in the latter case is as follows: "If an assignor with a defective title purports and intends to assign property for value, any interest subsequently acquired by him in that property is available in equity to make the assignment effectual, even though the defect in title is apparent on the face of the assignment." The curious point is that the latter case is mainly founded on *In re Hoffe's Estate Act*, 1855 (1) and *Noel* v. *Bewley* (3), and that the former case is almost entirely founded on *Noel* v. *Bewley* (3), yet in neither case was the attention of the Court drawn to the fact that the decision of Shadwell V.-C. in *Noel* v. *Bewley* (3) had been overruled by the House of Lords in *Smith* v. *Osborne*. (4)

Having carefully examined the cases, I feel convinced that the decision in *In re Hoffe's Estate Act*, 1855 (1), in which the principle stated in *Noel* v. *Bewley* (3) was followed, was right; that the principle so stated was the right principle; and that the decision in *Noel* v. *Bewley* (3) was wrong only because the principle was misapplied by Shadwell V.-C. to the particular facts then before him. But in each of the cases of *In re Hoffe's Estate Act*, 1855 (1), and *In re Bridgwater's Settlement* (2), and in the case before me, the circumstances were different. There, as here, there was an absolute unconditional assignment of something which the assignor thought he had, but which he had not. The assignment here is not, in my judgment, limited to the part of the fund supposed to have been already appointed to the settlor, but is an out-and-out assignment of one-third of 6500*l.*, though the recitals purport to show a title to it which did not in fact exist.

In *Smith* v. *Osborne* (5) the Lord Chancellor says: "The doctrine of the Court of Chancery is, that if a man contracts to convey, or to mortgage, or to settle an estate, and he has not at

(1) [1900] W. N. 114; 82 L. T. 556.
(2) [1910] 2 Ch. 342.
(3) 3 Sim. 103.
(4) 6 H. L. C. 375.
(5) 6 H. L. C. 390.

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the time of his contract a title to the estate, but he afterwards acquires such a title as enables him to perform his contract, he shall be bound to do so. . . . The principle is well established." Then he proceeds to distinguish a case in which there is no out-and-out conveyance but a mortgage or assignment of a particular title. The same view is expressed in that part of the speech of Lord Wensleydale (1), where he says: "Is this a covenant to convey the townlands of Stonehouse to the trustees absolutely, whenever the covenantor was entitled to them in possession? Or is it a bargain only with respect to the contingent interest, or spes successionis, or more correctly, a bargain to convey the estates, conditionally, if they should vest in possession in Mr. Boyse Osborne, the covenantor, under the will of the grandfather, Thomas Carr?" Later on (2), referring to *Noel* v. *Bewley* (3), he says: "The Vice-Chancellor then declared that the law was, that if a person had conveyed a defective title, and afterwards acquired a good one, the covenant would render that good title available to make the conveyance effectual. This, no doubt, was true, if the person had agreed to sell and convey an estate absolutely in the first instance; then if he had no title at the time of the contract, and afterwards acquired one, he would be bound to make good his contract, and to convey it; but if he never covenanted absolutely to convey, but only conditionally, and the condition was never fulfilled, he was under no such obligation. It was clearly a mistaken application on the part of the Vice-Chancellor of an established rule to a case to which it was not applicable; and, in my judgment, the case was on that account wrongly decided, and is of no authority." There only a conditional title was conveyed. Here I hold that the 2000*l.* appointed by the will, which is less than the one-third of 6500*l.* mentioned in the second settlement, is caught by that settlement, for, although the supposed title to the one-third is recited therein, what the settlor purports to convey is one-third of 6500*l.* She had in fact no share in the sum of 6500*l.* at the time, but has

(1) 6 H. L. C. 394. (2) 6 H. L. C. 398.
(3) 3 Sim. 103.

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since become entitled to a slightly smaller share; and, in my judgment the case falls precisely within what the Lord Chancellor said in *Smith* v. *Osborne*. (1) She purported to settle an amount and afterwards substantially got it. Under the principle laid down in *Smith* v. *Osborne* (2); *In re Hoffe's Estate Act*, 1855 (3); and *In re Bridgwater's Settlement* (4) I hold that the 2000*l*. is caught by her settlement, and direct it to be paid over to the trustees of that settlement.

Solicitors for all parties except Mrs. Troyte-Bullock: *Gard, Lyell, Betenson & Davidson.*

Solicitors for Mrs. Troyte-Bullock: *Badham, Comins & Sloman, for Batten & Co., Yeovil.*

F. E.

CROFT *v.* WILLIAM F. BLAY, LIMITED.

ASTBURY J.
1919
Jan. 29, 30; *Feb.* 19.

[1918 C. 1726.]

Landlord and Tenant—Lease for a Year and a Fraction—Holding over—Tenancy from Year to Year—Date of Commencement—Notice to quit.

By an agreement dated November 15, 1915, the plaintiff let premises to the defendant "for the term of one year and one-eighth of another year from November 11, 1915, at the yearly rent of 40*l*. payable quarterly on the usual quarter days, the first payment to be for the half quarter ending December 25, 1915, and to be the sum of 5*l*."

The original term having expired at Christmas, 1916, the defendant held over without any further agreement, so that on the plaintiff's acceptance of the quarter's rent due on Lady Day, 1917, the defendant was recognized as tenant from year to year:—

Held, that this yearly tenancy was a new tenancy commencing at Christmas, 1916, and determinable on any subsequent Christmas Day accordingly.

Doe v. *Dobell* (1841) 1 Q. B. 806; *Berrey* v. *Lindley* (1841) 3 Man. & G. 498; and *Kelly* v. *Patterrson* (1874) L. R. 9 C. P. 681 explained and distinguished.

ORIGINATING SUMMONS.

By an agreement dated November 15, 1915, and made

(1) 6 H. L. C. 390.
(2) Ibid. 375.
(3) [1900] W. N. 114; 82 L. T. 556.
(4) [1910] 2 Ch. 342.

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between the plaintiff of the one part and the defendant of the other part the plaintiff agreed to let and the defendant to take certain premises "for the term of one year and one-eighth of another year from November 11, 1915, at the yearly rent of 40*l.* payable quarterly on the usual quarter days the first payment to be for the half quarter ending December 25, 1915, and to be the sum of 5*l.*"

The original term having expired on December 25, 1916, the defendant held over without any further agreement, so that on the plaintiff's acceptance of the quarter's rent due on March 25, 1917, the defendant was recognized as tenant from year to year.

On June 8, 1917, the defendant treating this yearly tenancy as a Christmas tenancy gave notice to quit on December 25, 1917.

The plaintiff however took the view that the tenancy was a Martinmas tenancy requiring six months' notice before November 11 to determine it, and declined to admit the validity of the above notice.

On October 21, 1918, after some correspondence and abortive negotiations the plaintiff issued this summons to determine the point, which it was agreed to have decided on originating summons.

Lyttelton Chubb for the plaintiff. Where an original tenant holds over and the landlord accepts rent, the yearly tenancy thereby created has always been treated not as a new tenancy but as an enlargement or continuation of the original tenancy, so that for purposes of computation the date of commencement of each current year is fixed by the commencement of the original tenancy, even where the original term was for years and a fraction: *Doe* v. *Dobell* (1); *Berrey* v. *Lindley* (2); *Kelly* v. *Patterrson.* (3)

The text-books are unanimous on the point. See Halsbury's Laws of England, Vol. 18, p. 448; Foà on Landlord and Tenant, 5th ed., p. 593; Woodfall on Landlord and Tenant, 19th ed., p. 418; Redman on Landlord and Tenant,

(1) 1 Q. B. 806. (2) 3 Man. & G. 498.
(3) L. R. 9 C. P. 681.

6th ed., p. 561; 2 Smith's Leading Cases, 12th ed., p. 123.

The rule only applies to an original tenant, not to his assignee: *Doe* v. *Lines*. (1)

The same rule applies where the lessor's interest terminates at some broken period of a year of tenancy, and the new owner accepts rent: *Roe* v. *Ward* (2); *Doe* v. *Weller*. (3)

Micklem K.C. and *Foà* for the defendant. The defendant's original tenancy was for the half quarter ending December 25, 1915, and then for the year ending December 25, 1916. His term then ended. On holding over and paying rent on March 25, 1917, he became a tenant from year to year. That must have given him at least one year. But if the plaintiff is right his tenancy could have been terminated on November 11, 1917, so that he would only have had an extra ten and a half months. Now one of the terms of his original holding was that his tenancy should cease at Christmas. That term must surely be imported into the yearly tenancy, making it a Christmas tenancy.

That is the common-sense view of the case.

The rule to the contrary laid down in the text-books is not borne out by the authorities.

In *Roe* v. *Ward* (2) and *Doe* v. *Weller* (3) where the lessor's interest ceased at a broken period of the tenancy, the acceptance of rent by the new owner was treated as an adoption or confirmation of the original tenancy, though only as from year to year, and the date naturally ran from the original commencement. Those cases do not assist the plaintiff.

In *Doe* v. *Dobell* (4) there was not, as the text writers assume, a tenancy for eighteen months with a subsequent holding over. It was a yearly tenancy from the start terminable at three months' notice at any time after the first eighteen months.

Again in *Berrey* v. *Lindley* (5) there was no five and a half years' term with a holding over. The lease for five and a half years was void under the Statute of Frauds, and the tenancy was from year to year throughout, though no doubt

(1) (1848) 11 Q. B. 402.
(2) (1789) 1 H. Bl. 97.
(3) (1798) 7 T. R. 478.
(4) 1 Q. B. 806.
(5) 3 Man. & G. 498.

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determinable without notice at the end of the five and a half years.

In *Kelly* v. *Patterrson* (1) the letting was from year to year. The lessor's title ceased in the middle of the current year. The new owner accepted rent, and the Court naturally treated this as a confirmation of the original tenancy.

Again, where a tenant enters in the middle of a quarter and agrees to pay rent on the usual quarter days, the tenancy is deemed to commence with the first quarter day: *Doe* v. *Johnson* (2); *Doe* v. *Stapleton* (3); *Doe* v. *Grafton* (4); *Simmons* v. *Underwood* (5); unless the commencement of the tenancy is clearly defined otherwise: *Sidebotham* v. *Holland.* (6)

In the present case the agreement was dated November 15, 1915, and the term for purpose of computation of rent was reckoned from November 11, but there is no evidence how long before Christmas the defendant actually entered, or anything to fix the actual commencement of the tenancy. Prima facie therefore it commenced at Christmas, 1915.

On this point see also *Shaw* v. *Kay* (7) and *Doe* v. *Matthews.* (8)

Lyttelton Chubb in reply. In *Kelly* v. *Patterrson* (9) Brett J., in a considered judgment, treated tenancies coming to an end (*a*) by efflux of time, or (*b*) by the lessor's death or cesser of title as on the same footing. Surely in either case the owner by accepting rent adopts the person in possession as yearly tenant on the old terms so far as applicable to the continued tenancy. The original termination is of course gone, but the original commencement remains and settles the anniversaries of the date for which notice to quit must be given.

The text writers may no doubt have failed to discover the point decided in *Doe* v. *Dobell* (10); but it is very doubtful

(1) L. R. 9 C. P. 681.
(2) (1806) 6 Esp. 10.
(3) (1828) 3 C. & P. 275.
(4) (1852) 18 Q. B. 496.
(5) (1897) 76 L. T. 777.
(6) [1895] 1 Q. B. 378.
(7) (1847) 1 Ex. 412.
(8) (1851) 11 C. B. 675.
(9) L. R. 9 C. P. 681, 683.
(10) 1 Q. B. 806; 1 G. & D. 218; 10 L. J. (Q. B.) 242; 5 Jur. 434.

whether the reporters who heard the case argued at length and decided can have gone so far astray. The headnote by Charles James Gale, the author of Gale on Easements, and Henry Davison is absolutely clear.

As to the second point the commencement of the term was clearly fixed on November 11, 1915, and there is no room for any inference that it began at Christmas: *Sidebotham* v. *Holland*. (1)

Cur. adv. vult.

Feb. 19. ASTBURY J., after stating the facts: The plaintiff refused to accept notice to quit at Christmas, 1917, and contends that the tenancy could only be determined by a notice expiring on November 11, being the date from which he alleges that the premises were held at the date of the notice. This contention is a startling one, and as it is a common thing in this country for tenancies to commence at the half quarter, the issue in this case is of some interest and importance.

The plaintiff relies on three authorities: *Doe* v. *Dobell* (2), *Berrey* v. *Lindley* (3), and *Kelly* v. *Patterrson* (4), and as he submitted that the proposition for which he contends has long been accepted, and has for many years been treated as established in the text-books, he claimed and I allowed him to refer to a number of them.

His proposition is that, when a demise is for a year or years and a portion of a year, and the tenant holds over and pays rent after the expiration of the original demise by effluxion of time, the current year of the tenancy from year to year so created is treated as determinable on the anniversary of the commencement, and not of the determination of the original term.

In the present case the agreement of tenancy was dated November 15, 1915, and there is no evidence that the defendant was let into possession at an earlier date. The term was however expressed to be for one year and an eighth of a year from November 11, 1915; the rent reserved was payable

(1) [1895] 1 Q. B. 378.
(2) 1 Q. B. 806.
(3) 3 Man. & G. 498.
(4) L. R. 9 C. P. 681.

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quarterly on the usual quarter days, and an agreed sum of 5*l.*, calculated from November 11, was made payable on December 25, 1915. This term expired on December 25, 1916, and on the payment and acceptance of a quarter's rent on March 25, 1917, the defendant was recognized as a yearly tenant and became entitled to determine his tenancy at the expiration of any current year of his new yearly holding.

It is clear that this holding did not commence in fact on November 11, 1916, during the currency of the original demise, and if the plaintiff's contention is sound, the defendant, without any express agreement to that effect, became a tenant from year to year as from Christmas, 1916, for a period of ten and a half months or for a year or years and ten and a half months, and not for one or more complete years, as has always been supposed to be a characteristic of these holdings. This is a contention in support of which some very clear and definite authority seems necessary, if it is to prevail.

In *Doe* v. *Smaridge* (1) Lord Denman said: "A tenancy from year to year . . . . is determinable by either party at the end of any year. . . . . There is no reason why it should not be so determined at the end of the first year . . . . unless the parties have by express contract prevented such determination."

Again, in *Doe* v. *Lea* (2) it was held that notice to quit must be to quit at the end of the tenant's year.

In *Doe* v. *Porter* (3), which was a case of a tenancy from year to year, the administrator of an intestate tenant was held to have the same interest in the land as the intestate. This case is cited in the text-books as establishing the rule that a tenancy from year to year is terminable at the period at which the tenancy commenced, but Lord Kenyon's language in giving judgment was: "As between the original parties, as long as both . . . . lived, [the tenant] could not have been dispossessed without six months' notice ending at the expiration of a year."

Generally speaking an implied tenancy from year to year

(1) (1845) 7 Q. B. 957, 958. (2) (1809) 11 East, 312.
(3) (1789) 3 T. R. 13, 16.

created by the payment and acceptance of rent after the determination by effluxion of time of a previous term is deemed to have commenced at the same date as the original term, that original term being usually for one or more complete years, which necessarily end at the same period of the year as they commence, and this has come to be spoken of as a "rule."

When the holding over and acceptance of rent by a new owner occurs by the determination of the original lessor's title during the currency of an original term, this has been treated as evidence of an agreement that the tenant shall continue to hold on the terms of the original demise, so far as applicable to a tenancy from year to year. Thus in *Roe* v. *Ward* (1) when a lease executed by a life tenant, determined on his death in the middle of a year, and the remainderman accepted rent from the lessee, this was held to adopt and confirm the original tenancy as from year to year, and a six months' notice to quit ending with the old year was held to be good.

In *Doe* v. *Weller* (2) a similar principle was applied, and any break in the commencement of the tenant's year was thus obviated, although in law a new tenancy agreement was made after the determination of the original lessor's title.

I will now turn to the three authorities relied on by the plaintiff.

In *Doe* v. *Dobell* (3) a tenancy was created for one year and six months certain from August 13, with an express provision that it might be terminated by a three months' notice to quit, and the tenant held over and paid rent after the expiration of the eighteen months; it was held that a notice to quit on the date of the commencement of the original term was good. Patteson J. said: "In all cases the 'current year' refers to the time of entry, unless the parties stipulate to the contrary. Here, therefore, the current year would end on August 13. It may be that, on this construction, the 'six months certain' will have no meaning; but if parties

(1) 1 H. Bl. 97. (2) 7 T. R. 478.
(3) 1 Q. B. 806, 808; 1 G. & D. 218.

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will express themselves so vaguely we cannot help the consequences." The effect of this decision, judging it as best one can from the meagre reports, appears to be that the ambiguous terms of the demise were regarded as a letting for one year, coupled with an express provision which had the effect that notice should not be given to determine the tenancy earlier than six months from the end of the year, and that after the tenant had enjoyed the benefit of this provision and held over and paid rent subsequently, the usual rule applied that the new tenancy from year to year could only be determined at the end of a completed year, which had to be calculated, as Lord Denman said, with reference to the original commencement of the term. On the construction which the Court apparently put upon the agreement there was no other date from which it could be calculated : see the report and headnote in Gale and Davison.

Berrey v. *Lindley* (1) really decided nothing more than that a tenancy, which was in fact one from year to year only, was determinable by proper notice expiring at the same period as the original entry, and that this having been at Michaelmas, the tenancy was a Michaelmas holding and determinable as such.

Before dealing with *Kelly* v. *Patterrson* (2), the last case relied on by the plaintiff, I will refer to *Doe* v. *Lines*. (3) In that case a tenant for a term commencing at Christmas, 1825, granted an underlease commencing at Christmas, 1831, but ending at Midsummer, 1846. The underlessor and underlessee both assigned their interests, and on the expiration of the underlease at Midsummer, 1846, the assignee undertenant held over and paid rent to the assignee of the lease. It was held that the tenancy from year to year created by the holding over and payment of rent after Midsummer, 1846, commenced from that date and was terminable at Midsummer and not at Christmas. It is true that in giving judgment Lord Denman said that the original entry referred to in the earlier cases was that of the lessee himself and not of his

(1) 3 Man. & G. 498. (2) L. R. 9 C. P. 681.
(3) 11 Q. B. 402.

assignee; but it is difficult to follow how this distinction could affect the date from which the implied tenancy from year to year must be deemed to have commenced. This case is no authority in favour of the plaintiff's contention, and the decision amounts in reality to a confirmation of the view that a tenancy of this character commences from the expiration and not from the commencement of the original term, if the two periods differ.

With regard to this and many of the cases in which this rule is referred to, I am reminded of what Lord Halsbury said in *Quinn* v. *Leathem* (1): "There are two observations of a general character .... and one is .... that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it."

The rule that the commencement of these implied tenancies is fixed by the date of the commencement of the original term appears to have arisen and to have been laid down in cases when this date and the end of any current year of the implied tenancy necessarily coincided, and this period of the year is frequently referred to in the authorities indifferently as the beginning of the original term or end of the current year of the new tenancy.

Authorities such as *Roe* v. *Ward* (2) and *Doe* v. *Weller* (3) are not in conflict but in accordance with the view that the early authorities in speaking of this rule were not contemplating cases where the two dates were not coincident, because although in law the original terms in those cases came to an end in the middle of a year or quarter, the acceptance of rent subsequently was treated as an adoption or affirmation of the original tenancy by the new owner

(1) [1901] A. C. 495, 506. (2) 1 H. Bl. 97.
(3) 7 T. R. 478.

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though in the form of one from year to year: see further on this point *Humphreys* v. *Franks*. (1)

I have examined a large number of decisions in addition to those cited in the argument before me, some of which I have dealt with in this judgment, and I have found none where the rule, that a holding over tenancy is terminable at the date when the original term began, has been held to apply when the original term, validly or admittedly created, commenced in the middle of a quarter and was for a year or years and a portion of a year, and in which the rent reserved was made payable on the usual quarter days, nor have I found any decision which by analogy would make the rule applicable to such a case.

I now come to *Kelly* v. *Patterrson* (2), the last case relied upon by the plaintiff. Premises were let to Hudson on a lease expiring at Midsummer, 1866. Hudson underlet them to the defendant Patterrson from year to year from Michaelmas. On the expiration of Hudson's lease at Midsummer, 1866, the owner in fee granted a new lease to the plaintiff Kelly, to whom Patterrson, the underlessee, thenceforth paid his rent. The Court held that the defendant Patterrson was thereby adopted as tenant from year to year on the terms on which he originally held, and that his tenancy was terminable accordingly at Michaelmas and not at Midsummer. This decision is in accord with those in *Roe* v. *Ward* (3) and *Doe* v. *Weller* (4), and the question was not decided as to the effect of a tenant holding over after the expiration of an original demise for a year and a portion of a year. Brett J., in giving judgment, after referring to *Roe* v. *Ward* (3), *Berrey* v. *Lindley* (5), and *Doe* v. *Lines* (6), and the rule therein referred to, said (7): "The inference, as between [the defendant] and the plaintiff, who allowed him to hold over, and who received rent as from year to year from him without explanation or stipulation, is, that there was a tacit agreement that the defendant should hold as tenant from year to year

(1) (1856) 18 C. B. 323.
(2) L. R. 9 C. P. 681.
(3) 1 H. Bl. 97.
(4) 7 T. R. 478.
(5) 3 Man. & G. 498.
(6) 11 Q. B. 402.
(7) L. R. 9 C. P. 687.

according to his former holding,—that is to say, as from Michaelmas to Michaelmas." In other words the tenancy was only terminable at the end of a year calculated from the date when his holding, so affirmed, in fact commenced.

In *Soames* v. *Nicholson* (1) Lord Alverstone said: "No doubt the general rule is that in the case of a yearly tenancy, where nothing is said about the time at which it is to be determined, it can only be put an end to by a notice expiring at the date corresponding to that of its commencement." And the same thing was said in *Dixon* v. *Bradford and District Railway Servants' Coal Supply Society.* (2)

I will now turn to a different aspect of the case. In *Doe* v. *Grafton* (3) premises were let from April 19, 1841, at a yearly rent payable quarterly, the first proportionate payment of rent to be made on June 24, 1841, and the tenancy to last until six months' notice to quit was given. It was held that six months' notice to quit, given on June 24, 1851, was valid, although June 24 was not the actual commencement of the term.

In *Doe* v. *Johnson* (4) it was held that if a tenant comes in in the middle of a quarter, paying a proportionate rent to the commencement of the succeeding quarter day, from which date he pays his rent half yearly, his tenancy for the purposes of a notice to quit commences from the quarter day. This was followed in *Doe* v. *Stapleton* (5), and was recognized as sound in *Sidebotham* v. *Holland* (6), where however, as the agreement of tenancy was for a yearly tenancy commencing on May 19, the Court held that the commencement of the tenancy was too clear and unambiguous to warrant any inference which might otherwise have been drawn from the stipulation in the agreement that the rent was to be paid on the usual quarterly days; if the agreement had been for a tenancy for a year and the portion of the year between May 19 and June 24, the result, qua the date on which notice to quit must expire, might, and I think would, have been different.

(1) [1902] 1 K. B. 157, 158.
(2) [1904] 1 K. B. 444.
(3) 18 Q. B. 496.
(4) 6 Esp. 10.
(5) 3 C. & P. 275.
(6) [1895] 1 Q. B. 378.

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I will now say a word as to the text-books. In the notes to *Clayton* v. *Blakey* (1) in Smith's Leading Cases. *Doe* v. *Dobell* (2) was first referred to in the 4th ed., 1856, Vol. II., p. 91, in these colourless words: "It has been held that the notice [to quit] must end with the period at which the tenancy commenced, even although the demise be in terms for one year and six months certain." This note was by Willes and Keating JJ., the same learned editors not having referred to the case in the 3rd ed., and it was continued by the late Lord Collins up to and including the 9th ed., 1887, Vol. II., p. 123. In the 10th ed., 1896, Vol. II., p. 128, it was altered, and has since appeared as follows: "Where a tenant holds over and becomes a yearly tenant, then, if the time of the year at which the term originally commenced and the time at which it ended be not the same, the notice must, prima facie, be made to expire at the former time." *Berrey* v. *Lindley* (3) and *Kelly* v. *Patterrson* (4) are cited as additional authorities in support of this proposition. Other text writers, citing the same three decisions, have laid down the same proposition for some years past in varying forms, to the effect that where a lease is for a year or years and a portion of a year, and the tenant holds over and pays rent, the current year of the yearly tenancy is treated as ending on the anniversary of the commencement and not of the determination of the original term.

In my judgment this proposition is not sound or justified by the decisions cited in support of it. In Roscoe's Nisi Prius, 18th ed., p. 1017, the non-committal attitude as to *Doe* v. *Dobell* (2) adopted in the notes in the earlier editions of Smith's Leading Cases is, and has for years been followed, and in Smith's Manual of the Law of Landlord and Tenant, published in 1871, p. 52, the law is, accurately as I think, stated thus: "Where a person has entered under a lease void by the Statute of Frauds, and has become, by implication, tenant from year to year, such tenancy may be determined by the usual notice to quit at the end of the first or any

(1) (1798) 8 T. R. 3.
(2) 1 Q. B. 806.
(3) 3 Man. & G. 498.
(4) L. R. 9 C. P. 681.

subsequent year thereof" ; and *Doe* v. *Dobell* (1) is cited at p. 268 merely as deciding that a longer or shorter notice to quit than six months may be stipulated for.

It would appear therefore that the text writers are not at one on the proposition contended for by the plaintiff, and on which the issue in this case, in part only, depends ; and the decisions relied on do not, when carefully examined, deal with facts, or with inferences of fact, really relevant to its consideration, and no practice based on this proposition of law—if it be really one of law at all—has been alleged or proved to have grown up on the faith of it.

It seems elementary that a contract implied from conduct cannot come into being before the acts from which it is inferred take place, and it is one of the fundamentals of a tenancy from year to year that it cannot, in the absence of express agreement, be put an end to before the expiration of twelve months from its commencement, and in my judgment the tenancy from year to year in the present case was, on the true inference to be deduced from all the facts, a Christmas holding commencing on December 25, 1916, and terminable as such.

I therefore hold that the defendant's notice to quit, dated June 8, 1917, was good, and I order the plaintiff to pay the costs of the action.

Solicitors: *H. M. R. Pothecary, for Drummonds, Croydon ; E. S. Trehearne.*

(1) 1 Q. B. 806.

G. R. A.

ASTBURY J.
1919
Jan. 24; Feb. 21.

BROWN *v.* BRITISH ABRASIVE WHEEL COMPANY, LIMITED.

[1919 B. 97.]

Company—Articles—Alteration—Power enabling Majority to expropriate Minority on proper Compensation—Benefit of Company as a whole—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 13.

A company was in great need of further capital. The majority, representing 98 per cent. of the shares, were willing to provide this capital if they could buy up the 2 per cent. minority.

Having failed to effect this by agreement, they proposed to pass an article enabling them to purchase the minority shares compulsorily on certain terms therein mentioned, but were willing to adopt any other mode of ascertaining the value that the Court thought fit:—

Held, in the circumstances, that the proposed article was not just or equitable or for the benefit of the company as a whole, but was simply for the benefit of the majority. It was not therefore an article that the majority could force on the minority under s. 13 of the Companies (Consolidation) Act, 1908.

MOTION.

The defendant company was incorporated as a private company on January 12, 1909, and on May 9, 1911, it was turned into a public company.

The present capital was 50,000 in 1*l.* ordinary shares, all issued and fully paid.

The articles adopted Table A with modifications.

Art. 8 empowered the directors in their absolute discretion and without assigning any reason to decline to register a transfer. Subject thereto a member might transfer his shares to his relatives therein mentioned, or to any member of the company.

Art. 10 provided that no share should be transferred to a non-member so long as any member was willing to purchase at the fair value determinable as thereinafter provided.

Art. 11 provided that a member desiring to sell should give a sale notice to the company.

Art. 12 contained provisions as to the company finding a purchaser.

Art. 13 provided that "the fair value of shares or the price

at which shares may be purchased in pursuance of a sale notice, shall be such a sum as having regard to the dividends declared by the company in the three last preceding years would give an average return of 12½ per cent. per annum on such price."

Art. 25 provided that on a poll every member should have one vote per share.

The company had hitherto not been successful and was practically at the end of its resources at the beginning of 1918.

In the previous nine years of its existence it had only paid four dividends—namely, 2½ per cent. in 1913; 5 per cent. in 1915; 6 per cent. in 1916; and 5 per cent. in 1917. There was no dividend in 1918.

Two shareholders, Smith and Astbury, however held a high opinion of the company's secret processes and determined to make it a success. In March, 1918, they accordingly offered to buy up the shares of the existing members at par.

This offer was to a large extent accepted, and Smith and Astbury now held 49,119 out of the 50,000 shares, and the three directors held 100 shares each. The remaining shares belonged to five small holders, including the plaintiff, who held 50.

The position of the company had now improved. The board, which had been reconstituted, was active in the company's interest, and the holders of the controlling interest being known to the bank, financial assistance was forthcoming. Developments were anticipated, and the directors and the owners of the controlling interest thought it desirable that those owners should have power to buy up the rest of the shares, because a great deal more capital would be required, and difficulties might arise with regard to shareholders who did not contribute. The proposed power would facilitate the introduction of further capital. The alternative would be a winding up. The directors were of opinion that the proposed power was for the benefit of the company as a whole.

On January 10, 1919, the directors gave notice of extraordinary meetings to pass the following article by special resolution :

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Art. 15A. "A member who holds shares in the company shall be bound upon the request in writing of the holders or holder of nine-tenths of the issued shares to sell and transfer his shares ex dividend to the nominee of such holders or holder in consideration of the payment of the fair value of his said shares ascertained in accordance with the provisions of clause 13 of these articles or the par value thereof (whichever shall be the greater) and the sale shall be carried into effect at the company's office 21 days after the date of the request, and if the member so called upon to sell and transfer makes default in so doing the company may receive and give a good receipt for the purchase money on his behalf and may register the said nominee as holder of the said shares and issue to him a certificate for the same and thereupon the said nominee shall become indefeasibly entitled thereto. The vendor shall in such case be bound to deliver up his certificate for the said shares and on such delivery shall be entitled to receive the said purchase money without interest." Here followed provisions for service of the request by registered letter, and proof of the posting by statutory declaration.

On January 14, 1919, the plaintiff on behalf of himself and all other shareholders other than the directors issued a writ and notice of motion to restrain the company and directors from convening or holding meetings to pass, and from passing, art. 15A.

The plaintiff did not challenge the bona fides of the directors or the majority, but submitted that it was not in the interests of the company as a whole to pass an article enabling the majority to expropriate the minority. This was prima facie oppressive and contrary to natural justice.

The motion was treated as the trial of the action.

Micklem K.C. and *Dighton Pollock* for the plaintiff. The proposed article authorizes the majority to expropriate the minority without any just cause. That is contrary to natural justice: *Dawkins* v. *Antrobus* (1); *Baird* v. *Wells*. (2)

(1) (1881) 17 Ch. D. 615, 620. (2) (1890) 44 Ch. D. 661, 670.

The power of altering articles under s. 13 of the Companies (Consolidation) Act, 1908, must be exercised subject to the general principles of law and equity applicable to powers enabling majorities to bind minorities, and it must be exercised bona fide for the benefit of the company as a whole: *Allen* v. *Gold Reefs of West Africa, Ld.* (1); Buckley on Companies, 9th ed., pp. 23–25.

The benefit of the company as a whole means the benefit of all the corporators both the majority and the minority. This is simply for the benefit of the majority and cannot be allowed: *Menier* v. *Hooper's Telegraph Works.* (2) See also *W. & A. M'Arthur, Ld.* v. *Gulf Line, Ld.* (3); *In re Peveril Gold Mines, Ld.* (4)

Upjohn K.C. and *Henry Johnston* for the defendants. The proposed article is obviously within the powers of s. 13. It is bona fide and for the benefit of the company as a whole—i.e., as an independent entity. It need not be for the benefit of every single corporator: *Allen* v. *Gold Reefs of West Africa, Ld.* (1)

It does not transgress any statutory provisions as in *In re Peveril Gold Mines, Ld.* (4)

The company as an entity is in great need of further capital. The 98 per cent. majority are willing to provide it if they can buy up the 2 per cent. minority. That is far more for the benefit of the company than a winding-up, which is the alternative. The article was intended to be absolutely fair. But in order to avoid any conceivable risk of injuring the minority, the majority are quite willing to have the proper price of the shares ascertained by arbitration or in any other way the Court thinks fit.

Menier v. *Hooper's Telegraph Works* (2) was a case of fraud. See *Mason* v. *Harris.* (5) But bona fides is here admitted, and the case is really covered by *Allen* v. *Gold Reefs of West Africa, Ld.* (1) A similar new article was allowed in *Borland's Trustee*

(1) [1900] 1 Ch. 656, 671.
(2) (1874) L. R. 9 Ch. 350.
(3) 1909 S. C. 732.
(4) [1898] 1 Ch. 122.
(5) (1879) 11 Ch. D. 97, 107, 108.

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v. *Steel Brothers & Co.* (1) The only test is whether the new article would have been valid as an original article.

Micklem K.C. in reply. That is clearly not the test. Otherwise *Allen* v. *Gold Reefs of West Africa, Ld.* (2) would have been unarguable.

In *Borland's Trustee* v. *Steel Brothers & Co.* (1) it does not appear whether or not the new article was a reproduction of an original article. But it is immaterial, as Borland was a party to passing the new article, and no objection on the ground of oppression was raised.

ASTBURY J. (after stating the facts). The question is whether this alteration of the articles is one that this large majority are entitled to force on the minority.

The plaintiff contends that it is really an oppressive attempt to buy out the minority for the benefit of the holders of this large block of 49,119 shares. Although there is no allegation of mala fides the question is whether on the present evidence the proposition is or is not contrary to natural justice. If fair and just in the interest of the company and the shareholders generally, I have no right to interfere. If on the other hand it is oppressive, it is both my right and duty to prevent it being imposed on the minority.

Now the proposed alteration will place in the hands of the shareholders who hold the 49,119 shares the decision of the question whether the minority capital is to be bought up.

In 1918 they tried to buy it up at par by agreement. They were unable to do so. The proposed article will enable them to do forcibly what they were unable to effect by agreement with the minority. It is tantamount to saying: "If you will not agree to sell your shares we will take compulsory powers to make you." The provision requiring the request of the holders of nine-tenths of the issued shares is not important. If the article is valid with that provision, it would be valid if it provided for a sale at the request of a bare majority.

The majority are perfectly frank. They are unwilling to

(1) [1901] 1 Ch. 279. (2) [1900] 1 Ch. 656.

risk putting up further capital, unless their interest is commensurate with their outlay and they get the whole of the shares in their hands.

They say that the alteration is directly within s. 13 of the Companies (Consolidation) Act, 1908, and the authorities thereon, and that I have no alternative but to dismiss the motion.

Sect. 13 provides that "Subject to the provisions of this Act and to the conditions contained in its memorandum, a company may by special resolution alter or add to its articles; and any alteration or addition so made shall be as valid as if originally contained in the articles, and be subject in like manner to alteration by special resolution."

This language, though very wide, must obviously be read with some qualification, and many instances outside the range of validity contemplated by the section are referred to in Buckley on Companies, 9th ed., pp. 23-25.

In *Allen* v. *Gold Reefs of West Africa, Ld.* (1) the majority of the Court of Appeal sanctioned, as against the only holder of fully paid shares, a new article imposing a lien on fully paid shares. Lindley M.R. said: "The power thus conferred on companies to alter the regulations contained in their articles is limited only by the provisions contained in the statute and the conditions contained in the company's memorandum of association. Wide, however, as the language of s. 50 [now s. 13] is, the power conferred by it must, like all other powers, be exercised subject to those general principles of law and equity which are applicable to all powers conferred on majorities and enabling them to bind minorities. It must be exercised, not only in the manner required by law, but also bona fide for the benefit of the company as a whole, and it must not be exceeded."

The question therefore is whether the enforcement of the proposed alteration on the minority is within the ordinary principles of justice and whether it is for the benefit of the company as a whole. I find it very difficult to follow how it can be just and equitable that a majority, on failing to

(1) [1900] 1 Ch. 656, 671.

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purchase the shares of a minority by agreement, can take power to do so compulsorily.

The defendants contend that it is for the benefit of the company as a whole because in default of further capital the company might have to go into liquidation. The plaintiff is willing to risk that. The proposed alteration is not directly concerned with the provision of further capital, nor does it insure that it will be provided. It is merely for the benefit of the majority. If passed, the majority may acquire all the shares and provide further capital. That would be for the benefit of the company as then constituted. But the proposed alteration is not for the present benefit of this company.

The defendants relied on *Borland's Trustee* v. *Steel Brothers and Co.* (1) In that case however the present objection was not taken. The managers and assistants on whose exertions the success of the company depended were dissatisfied with their remuneration. New articles were adopted to get over this difficulty. Art. 58 provided that a person, other than a manager or assistant, holding ordinary shares might at any time be required by the directors to transfer them. It does not appear whether this article was in the original articles, but in any case Borland was a party to the passing of the new articles and bound by his bargain accordingly. Objections on the ground of repugnancy, perpetuity, and fraud on the bankruptcy law were raised and disposed of, but no case of any oppression of the minority by the majority was set up. The decision therefore in no way prevents me from criticising the proposal in the present case.

The defendants rely on the words of s. 13 providing that "any alteration . . . . shall be as valid as if originally contained in the articles," and say correctly that there could have been no objection to an original article in the form of art. 15A. They suggest that that is the test of the validity of a new article. But that is clearly not a valid test. Otherwise the arguments in *Allen* v. *Gold Reefs of West Africa, Ld.* (2)

(1) [1901] 1 Ch. 279. (2) [1900] 1 Ch. 656.

would have been unnecessary. The true meaning of this provision is that assuming the alteration is legal, it is as valid as if originally contained in the articles.

In the circumstances of the present case art. 15A is not an article that the majority are entitled to enforce on the minority and the injunction must go accordingly.

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Solicitors: *Andrew, Wood, Purves & Sutton, for R. A. Rotherham & Co., Coventry; Surr, Gribble & Co., for Docker, Hosgood & Co., Birmingham.*

G. R. A.

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PETERSON J. 1918 Dec. 3, 4, 5, 17.

[1916 N. 322.]

Will—Specific Devise of Farm—Description—Reference to Occupation—One definite and complete Entity—Incorrect Reference to Title to Part—Explanatory Comment—Rejection.

In 1861 a testator specifically devised "all that my messuage farm lands and hereditaments in Little Bentley and Little Bromley in the county of Essex now in the occupation of Mr. Thomas Girling purchased by me of Alderman Thorpe." The testator had a farm in Little Bentley and Little Bromley called "Welham's Farm," which was compounded of two small farms purchased by him of Alderman Thorpe in 1831, and of another adjoining small farm and a field both purchased by him in the same year of a Mr. Carrington. At the date of his will and of his death in 1862 the whole of the lands so purchased were in the occupation of Thomas Girling, who farmed them as one holding:—

Held, that the words "purchased by me of Alderman Thorpe" were merely explanatory comment, not defining or restricting the one definite entity with which the testator was dealing—namely, the farm in the occupation of Thomas Girling—and must be disregarded; and that the whole of "Welham's Farm" passed to the specific devisee.

WITNESS ACTION.

The testator Edward Norman, who died on March 28, 1862, made the following specific disposition by his will dated July 8, 1861: "I give and devise all that my messuage farm lands and hereditaments in Little Bentley and Little Bromley in the said county of Essex now in the occupation of Mr. Thomas Girling purchased by me of Alderman Thorpe

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Together with all the rights members and appurtenances to the said farm messuage lands and hereditaments and premises belonging or in any wise appertaining" unto the testator's nephew Edward Norman the son of his brother Charles Norman for life, with limitations to trustees to preserve contingent remainders and after the decease of Edward Norman to the use of his nephew's first and every other son successively in tail male, under which latter limitation the defendant Charles Norman the eldest son of Edward Norman succeeded to the devised property on the death of his father on May 11, 1915. In default of issue of his nephew Edward Norman the testator gave and devised "the said farm messuages lands and hereditaments in the parishes of Little Bentley and Little Bromley with all and every their respective rights members and appurtenances" unto his nephew Charles Frederick Norman for life with remainder to the use of such person or persons who should become entitled to his mansion house "Mistley Place" for life or otherwise under the limitations thereinafter contained "the fee simple of the said farm messuage lands and hereditaments" ultimately to vest in the person or persons who should under the said limitations ultimately become entitled to the fee simple and inheritance of "Mistley Place." Then followed a proviso declaring that the devise thereinbefore contained was upon the express condition that the said Edward Norman (son of Charles Norman) should within twelve months after the testator's death surrender to the Lord of the Manor to the uses therein mentioned certain copyholds purchased by the testator to which Edward Norman had been admitted tenant in trust for him "except nevertheless such copyhold messuages lands and hereditaments as shall form part and parcel of my said farm in Little Bentley and Little Bromley aforesaid devised to my said nephew Edward Norman (son of Charles Norman) and his heirs in strict settlement as aforesaid."

The testator devised his mansion house "Mistley Place" and his residuary real estate to the use of his nephew Charles Frederick Norman for life with remainder to divers uses under

which in the events which happened the plaintiff Edward Brise Kensit Norman on the death of Charles Frederick Norman on January 27, 1913, became entitled as tenant in tail in possession to the mansion house and residuary real estate, in all of which he had subsequently barred the entail and was at the time of action brought entitled thereto in fee simple.

In 1916 the plaintiff commenced this action claiming (inter alia) a declaration that certain parts of the farm of which the defendant and his father had been in possession ever since the testator's death under or by virtue of the specific devise above set out, were not in fact included in that devise. The parts in question consisted of a small farm called "Rixes," comprising forty-two acres, situate partly in the parish of Little Bentley and partly in the parish of Little Bromley, and in the occupation of James Girling, and a field called "Eastwood Field," both purchased from a Mr. Carrington by the testator in or about the year 1831 subsequently to the purchase by him from Alderman Thorpe of an adjoining estate, also in the occupation of James Girling, comprising about 132 acres, which constituted the greater part of the present farm. At the time of the testator's will and death the whole of the lands comprised in these purchases were in the occupation of Thomas Girling, who farmed them as one holding, which was then known as "Welham's Farm." The plaintiff alleged that only those lands actually purchased from Alderman Thorpe passed under the specific devise, and that "Rixes" and "Eastwood Field" passed under the residuary devise.

The result of the evidence at the trial material to the decision of this particular question, which alone calls for a report, appears in the following judgment of his Lordship.

Hughes K.C. and *P. F. Wheeler* for the plaintiffs.

To ascertain the lands specifically devised three elements must be considered—namely, what lands the testator possessed in the parishes named; which of them were in the occupation of Thomas Girling; which of the last-named lands were

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purchased of Alderman Thorpe. In construing the devise it is not permissible to stop at the words "Thomas Girling" and say that the rest of the description is falsa demonstratio. There is no inconsistency here, and no case for falsa demonstratio. The gift must be read strictly and only those lands passed which answered all the descriptions: *Morrell* v. *Fisher* (1); *Doddington's Case.* (2) The words "purchased by me from Alderman Thorpe" are restrictive of the earlier part of the gift, and limit it, and the plaintiff is entitled to all the lands not so purchased. *Eastwood* v. *Ashton* (3) was a case where the plan could not be reconciled with the description.

Tomlin K.C. and *Harman* for the defendant.

In devising "all that my farm now in the occupation of Thomas Girling" the testator was dealing with a particular well-defined farm about which there was no ambiguity. The addition "purchased by me of Alderman Thorpe" is merely falsa demonstratio. A grant of "all my manor of Sale, in Dale, which I had by descent," where "in truth he had it not by descent but by purchase; this is a good grant of the manor": Sheppard's Touchstone, p. 247. The earlier part of the gift produces a complete description and sufficient certainty (*Wrotesley* v. *Adams* (4)), and is not vitiated by the subsequent erroneous description: *Morrell* v. *Fisher* (1); *Llewellyn* v. *Earl of Jersey* (5); *Eastwood* v. *Ashton.* (3)

What passed by the specific devise was the only thing which was known to exist—namely, "all that my farm now in the occupation of Thomas Girling."

Cur. adv. vult.

Dec. 17. PETERSON J. The only point in this case which remains for decision is a question of construction arising out of a specific devise in the will, dated July 8, 1861, of Edward Norman of Mistley Place in the county of Essex, who died on March 28, 1862.

The question is whether the whole or only part of a farm

(1) (1849) 4 Ex. 591, 604.
(2) (1594) 2 Rep. 32*b*.
(3) [1915] A. C. 900.
(4) (1558) 1 Plowd. 187, 191.
(5) (1843) 11 M. & W. 183, 189.

called "Welham's Farm" in the parishes of Little Bromley and Little Bentley in the county of Essex passed by the devise. Edward Norman, the devisee for life, died on May 11, 1915, and the defendant is in possession of the whole of the farm and claims to be the person entitled thereto in remainder under the devise. The plaintiff, who claims that part of the farm was not included in the devise but passed under the residuary devise, is the person who became entitled to the lands comprised in the residuary devise on the death of his grandfather, Charles Frederick Norman, the tenant for life, on January 27, 1913. The defendant's father and the defendant have been in possession of the whole of the farm ever since the testator's death in 1862.

The question in dispute arises in this way: The farm contains about 180 acres, and was purchased by the testator in different lots. In the year 1831 Alderman Thorpe offered for sale by public auction the greater part of the present farm. The particulars of sale described the property as an eligible estate consisting of two compact farms, one of 78 acres 1 rood 35 poles, and the other of 54 acres 0 roods 27 poles, making a total of 132 acres 2 roods 22 poles. The smaller of these farms, in the particulars called the Cowhouse or "Cowies Farm," is described as having a farmhouse, two barns, and a newly erected bullock shed; on the other was situated the existing farmhouse. The whole of these lands were then in the occupation of one tenant, James Girling, and were purchased at the sale by the testator. In the same year the testator also purchased from a Mr. Carrington a small farm called "Rixes," which consisted of about 42 acres and, according to the particulars, had on it a small farmhouse, barn, sheds, and other outbuildings. This farm was also in the occupation of James Girling and, as in the case of the lands purchased from Alderman Thorpe, was partly in the parish of Little Bromley and partly in the parish of Little Bentley. The lands acquired by these two purchases adjoined and constituted one compact holding in the hands of James Girling. About the same time the testator also purchased from Mr. Carrington a field called "Eastwood Field" which

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lies immediately opposite to the south-west corner of the property purchased from Alderman Thorpe on the other side of the road which runs along the south-west and west sides of the land purchased from Alderman Thorpe and Mr. Carrington. At the time of the testator's will and death, some thirty years later, the whole of the lands comprised in the above purchases were in the occupation of Thomas Girling who farmed them as one holding. It does not appear for how long before the testator's will this tenant had been in occupation. The whole of the holding was then known as "Welham's Farm." It had been called by this name, which was originally the name given to that part of the lands purchased from Alderman Thorpe which consisted of about 78 acres, for at least some years before the testator's will was made, and that is the name by which the whole of the holding has ever since been known. The houses or cottages on "Cowies Farm" and "Rixes" were at the time of the testator's will and death, and for some time before those dates, occupied by the farmer's labourers. At the time of the testator's purchases they were not used as separate farmhouses, as James Girling, the farmer, was in occupation of all of the lands purchased, and I think must obviously have lived in the existing farmhouse; and, if necessary, I should infer that this was true of the period between the purchases in 1831 and the will in 1861. These houses or cottages have long since fallen into ruin and disappeared.

The plaintiff's contention is that only the lands which were purchased from Alderman Thorpe passed under the devise to Edward Norman for life and then to the defendant, and that the lands which were purchased from Mr. Carrington—i.e., "Rixes" and "Eastwood Field"—passed under the residuary devise. The specific devise is in these terms: "I give and devise all that my messuage farm lands and hereditaments in Little Bentley and Little Bromley in the said county of Essex now in the occupation of Mr. Thomas Girling purchased by me of Alderman Thorpe together with all the rights members and appurtenances to the said farm messuage lands and hereditaments and premises belonging

or in any wise appertaining unto my nephew Edward Norman "—and then come various limitations; and then, in default of issue, there is a gift over in these terms: "I give and devise the said farm messuages lands and hereditaments "—in the two parishes—"unto my nephew Charles Frederick Norman"; and again there is a reference a few lines further down to "the fee simple of the said farm messuage land and hereditaments." Then comes a proviso: "Provided always and I hereby declare that the devise hereinbefore contained for the benefit of my said nephew Edward Norman and his issue is upon this express condition that he the said Edward Norman do and shall within 12 months next after my decease surrender out of his hands . . . . all and every the copyhold messuages lands and hereditaments which were purchased by me and to which he the said Edward Norman stands admitted in trust for me "—for various uses—"except nevertheless such copyhold messuages lands and hereditaments as shall form part and parcel of my said farm in Little Bentley and Little Bromley aforesaid devised to my said nephew Edward Norman son of Charles Norman."

There is, as has been pointed out more than once (see Sheppard's Touchstone, p. 247; *Doddington's Case* (1); *Wrotesley* v. *Adams* (2)), a marked difference between a devise in general terms followed by words which limit or restrict the generality of the previous words, as, for example, a devise of "all my lands which were purchased from A. B.," which is equivalent to a devise of all such of my lands as were purchased from A. B., and a devise of a particular property with a wrong description added to it, as, for example, a devise of "my house called 'Welham's'" or "my farm called 'Welham's' purchased from A. B." In the one case the subsequent words are inserted for the purpose of defining the property which is intended to pass; in the other the property is already defined and certain without the addition of the subsequent words. In the former case the subsequent words cannot be rejected; but in the latter case as the property intended is already certain and defined the subsequent words

(1) 2 Rep. 32*b*.

(2) 1 Plowd. 187, 191.

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are treated as being merely of an explanatory nature, and if they are an incorrect description of the property which has already been ascertained they are rejected as falsa demonstratio. See *Wrotesley* v. *Adams* (1); *Llewellyn* v. *Earl of Jersey* (2); *Morrell* v. *Fisher* (3); *Eastwood* v. *Ashton*. (4) The difference is illustrated in this will in some other devises on p. 2, where the testator after devising his mansion house called "Mistley Place" goes on to say "Also all that piece or parcel of land called the Pightle partly converted into a garden purchased by me of the heir-at-law of Mr. George Rogers," and "Also all that my farm in Mistley aforesaid purchased by me of the late Mr. George Elmer." In the one case the testator is referring to a particular piece of land which he describes as being called the Pightle, and whether that land is purchased or not of the heir-at-law of Mr. George Rogers in those circumstances would appear to be immaterial; but when he comes to the next one "Also all that my farm in Mistley aforesaid purchased by me of the late Mr. George Elmer" it is obvious that the words "purchased by me of the late Mr. George Elmer" are an essential part of the definition of the parcels with which the testator is dealing.

The question in this case appears to be whether the words "purchased by me of Alderman Thorpe" are a necessary part of the description or definition of the property comprised in the devise; in other words, whether on the true construction of this will there is a devise of such of the testator's lands or farms in the two parishes as were in the occupation of Girling and had been purchased from Thorpe. Now, reading the words of this devise including the proviso, I am unable to come to any other conclusion than that the testator was dealing with a particular farm as one definite entity. The words "All that my messuage farm," &c., seem to me to point to something which is held or occupied as one thing. The devise over in default of issue is of "my said farm messuage lands and hereditaments," thus emphasizing the fact that it was a farm which was the subject of the devise. The

(1) 1 Plowd. 187, 191.
(2) 11 M. & W. 183, 189.
(3) 4 Ex. 591, 604.
(4) [1915] A. C. 900, 914.

proviso again refers to "my said farm." The testator was then speaking of a particular farm. What farm was it? It was the testator's farm in the two parishes which was then in the occupation of Thomas Girling. If the words "purchased by me of Alderman Thorpe" had been omitted there could be no doubt what was included in the devise, as the only farm of the testator in the two parishes which was occupied by Girling was the farm known as "Welham's Farm," which comprised all the lands which had been purchased by the testator from Alderman Thorpe or Mr. Carrington.

But it is said that the words "purchased by me of Alderman Thorpe" govern the extent of the devise and are words of definition and restriction, and that the only lands which passed by the devise were lands belonging to the testator in the two parishes which were in the occupation of Girling and had also been purchased from Alderman Thorpe; or, in other words, that the devise is one of such of the lands or farms of the testator in the two parishes as were in the occupation of Girling and had been purchased from Thorpe. The devise is, however, not in this form. It is a devise of the testator's farm in the two parishes then in the occupation of Girling purchased from Thorpe. Now, if in making this devise the testator is to be treated as having thrown his mind back to the purchase from Thorpe, it is to be observed that, according to the particulars, he purchased two farms and not one from Alderman Thorpe. This comment standing by itself might be hypercritical. The real answer appears to me to be that this devise is not a gift of the farm which had been purchased from Thorpe and was in the occupation of Girling. It is a devise of all that farm now in the occupation of Girling purchased from Thorpe. The farm which at the time of the testator's will and death was in the occupation of Girling consisted of the whole of the lands purchased from Thorpe and Carrington; and in my judgment the lands "purchased by me of Alderman Thorpe" ought to be treated as being in the nature, not of a definition or restriction, but of explanatory comment, and as they do not fit

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the farm which was in Girling's occupation, they should be disregarded.

Solicitors for plaintiff: *Roney & Co.*

Solicitors for defendant: *Withers, Bensons, Birkett & Davies, for Jones & Sons, Colchester.*

R. M.

YOUNGER J. 1918 *Nov.* 6. 1919 *Mar.* 10.

PATENT CASTINGS SYNDICATE, LIMITED *v.* ETHERINGTON.

Company—Manager's Remuneration—Agreement—Construction—Commission on "net profits"—Deduction of Excess Profits Duty—Finance (No. 2) Act, 1915 (5 & 6 *Geo.* 5, *c.* 89), *ss.* 35, 40, 45, *sub-s.* 3—*Finance Act*, 1916 (6 & 7 *Geo.* 5, *c.* 24), *s.* 49.

By an agreement of October 30, 1916, the defendant was appointed works manager of the business of the plaintiff company at a salary. The company agreed also to pay him at the end of each business year of the company, and within seven days of the holding of the annual general meeting, a further sum by way of commission of a percentage upon the "net profits" for the year. There was a provision that the certificate of the company's auditor should be conclusive as to what constituted net profits at the end of any such business year:—

Held, on construction, that "net profits" of the business for the year were the excess of the receipts for the year over the current expenses and outgoings of the same year—i.e., the fund which for that year was capable of being lawfully applied by the company to the payment of a dividend.

Held, as matter of law, that that fund could only be arrived at after deducting excess profits duty, which was a debt of the company to the Crown.

Held, therefore, that the commission ought to be calculated after deduction of excess profits duty.

Held, also, that (for the present purpose) no analogy between the incidence of income tax and that of excess profits duty exists.

Collins v. *Sedgwick* [1917] 1 Ch. 179 and *In re Condran* [1917] 1 Ch. 639 followed.

Thomas v. *Hamlyn & Co.* [1917] 1 K. B. 527, *William Hollins & Co.* v. *Paget* [1917] 1 Ch. 187, and *S. J. and E. Fellows, Ld.* v. *Corker* [1918] 1 Ch. 9, distinguished.

Whether the principle of *Attorney-General* v. *Ashton Gas Co.* [1904] 2 Ch. 621 applies to the income tax on profits or gains of a company which it does not divide, *quære.*

By an agreement of October 30, 1916, between the plaintiff company and the defendant (thereinafter called the works

manager), the defendant was appointed works manager of the business of the company for a period of five years and four months from November 1, 1916. Clause 5 provided: "The company shall pay to the works manager during the continuance of this agreement and provided he shall duly observe and perform the agreements herein on his part contained the salary at the rate of 500*l.* per annum for the first year of his employment hereunder at the rate of 550*l.* per annum for the second year of his employment hereunder at the rate of 600*l.* per annum for the third year of his employment hereunder at the rate of 650*l.* per annum for the fourth year of his employment hereunder and at the rate of 700*l.* per annum for the fifth and any subsequent year of his employment hereunder such salary to be payable by equal monthly payments on the first day of each month in every year without any deduction the first payment to be made on December 1, 1916. And shall also pay to the works manager at the end of each business year of the company during the continuance of this agreement and within seven days of the holding of the annual general meeting a further sum by way of a commission such sum to be made up as follows: (1.) 5 per cent. upon the net profits for the year (if any) of the said business up to 5000*l.* and (2.) $7\frac{1}{2}$ per cent. upon such net profits for the year as exceeds 5000*l.*" with a provision that "for the purposes of calculating such commission as aforesaid the certificate of the auditor of the company for the time being as to what constitute the net profits (if any) as aforesaid at the end of any such business year of the company during the continuance of this agreement shall be binding and conclusive upon the works manager."

On June 25, 1918, the company took out this summons to determine whether upon the true construction of the agreement for the purpose of calculating the amount described in clause 5 as "a further sum by way of a commission," and agreed to be paid to the defendant "at the end of each business year," the "net profits" referred to in the clause ought for such year to be ascertained (*a*) after deducting, or (*b*) without deducting any excess profits duty payable by the plaintiffs in or in respect of such year.

YOUNGER J. 1919 PATENT CASTINGS SYNDICATE, LTD. v. ETHERINGTON.

C. J. Mathew K.C. and *J. M. Gover* for the plaintiffs. Excess profits duty is a debt due to the Crown, Finance (No. 2) Act, 1915, s. 45, sub-s. 3, and must be deducted before net profits can be arrived at. The question is what the parties meant. The agreement must be given a construction which will leave the company with some profit and not with a loss. The Court will assume the parties meant what is reasonable. The company's profits, which had been very small before the agreement was entered into, are now very large.

[They cited *Johnston* v. *Chestergate Hat Manufacturing Co.* (1); *Collins* v. *Sedgwick* (2); *William Hollins & Co.* v. *Paget* (3); *Thomas* v. *Hamlyn & Co.* (4); *In re Condran* (5); *S. J. and E. Fellows, Ld.* v. *Corker* (6); and referred to Finance (No. 2) Act, 1915, ss. 38, 42, 45, sub-ss. 2, 3, and Dowell on Income Tax, 7th ed., p. 237.]

Disturnal K.C. and *Bremner* for the defendant. The question is what the parties meant. Reference to statutes and cases is useful only by way of analogy. "Net profits" means "profits which the company earns," not "profits which the company keeps"—i.e., has available for distribution. There is nothing in the agreement to show that the parties meant what is available for distribution.

[They referred to Income Tax Act, 1842, s. 101; Finance (No. 2) Act, 1915, Sched. IV., Pt. I., cl. 5; and Finance Act, 1916, s. 49.]

C. J. Mathew K.C. in reply.

Cur. adv. vult.

Mar. 10. YOUNGER J., after stating the agreement and the question raised. No evidence has been filed on either side. I know nothing of the circumstances of the company at the date of the agreement or of its constitution or of its history, position, or prospects. At that date, however, the excess profits duty was in existence, and, although nowhere mentioned, it must be taken to have been known to both of the parties, a circumstance not to be found in all the

(1) [1915] 2 Ch. 338.
(2) [1917] 1 Ch. 179.
(3) [1917] 1 Ch. 187.
(4) [1917] 1 K. B. 527.
(5) [1917] 1 Ch. 639.
(6) [1918] 1 Ch. 9.

cases in which the effect of this duty upon such agreements has been considered. I shall have in the sequel to refer to these cases and to the somewhat divergent judicial views upon the subject there expressed; and, as in one or other of the reports, the relevant sections of the statutes by which the duty is imposed will be found, these statutes being the Finance (No. 2) Act, 1915, and the Finance Act, 1916, I need not again detail them. I would merely, by way of introduction to what follows, emphasize the fact that the profits with reference to which the duty is, according to the Act of 1915, computed are not, either nominally or in any sense, "net profits" of a business, the phrase with which we are here concerned. The standard of "profits" thereby fixed is an arbitrary standard set up by the Legislature for the purpose only of the tax (s. 40, sub-s. 1, of the Act of 1915), and it results in a fund which differs both from that represented by the returns of profit for the purpose of income tax, and, in many far-reaching respects alike of omission and addition, from any fund constituting the net profits of a business in any ordinary acceptation of these words. I must also for the sake of clearness emphasize two further provisions of the statute of 1915: s. 35, which for the purposes of income tax treats the excess profits duty as an outgoing of the business reducing the profits in respect of which income tax is assessable; and s. 45, sub-s. 3, which provides that the amount of the excess profits duty "shall be recoverable as a debt due to His Majesty from the person on whom it is assessed," in the present case the plaintiff company. In these circumstances the question here is whether the fund of which the defendant is to receive a percentage, and which in the agreement is described as "the net profits for the year of the said business"—i.e., of the business of the plaintiff company—is a fund which, like the profits on which income tax is assessable, is to be arrived at after treating the excess profits duty as an outgoing, or whether the excess profits duty is part of the fund in the same way as under the Act of 1915 that duty is part of the "profits"—not, be it again observed, "net profits"—with reference to which the amount of the duty is arrived at.

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In order to answer this question it would seem desirable to ascertain at the outset, if one can, what, as used here, is the meaning of this expression "the net profits for the year of the business of the company."

That, after all, is the essential thing; and, if that inquiry had in all the cases been so regarded, I cannot doubt that some of the difficulties which now beset a judge of first instance in dealing with a case like this would not have emerged. *Thomas* v. *Hamlyn & Co.* (1) may be taken as an instance of what I mean. It was there, apparently, assumed on all hands that a phrase substantially identical with what we have here, "net profits of four branches," might be in effect treated as equivalent to a reference to the "profits" by which under the statute the amount of duty is ascertained, and a certain conclusion based upon that assumption was there foreshadowed. It cannot however, I think, be doubted, when the matter is really considered, that whatever else a fund so described may be, it is not the highly artificial fund of "profits" created by the statute. Indeed, the phrase "net profits" or its equivalent in such agreements as we are here concerned with might be treated just as properly—I myself think, more appropriately—as being the equivalent of the gains and profits with reference to which a company's income tax is assessed. But, if it be so treated, then under s. 35 of the statute of 1915 the excess profits duty becomes an outgoing to be deducted before these gains and profits are reached, and the conclusion foreshadowed in *Thomas* v. *Hamlyn & Co.* (1) on the other assumption is reversed. This is not to say that, in my view, the income tax standard can be properly looked to as the standard with reference to which the parties here ought to be taken to have contracted. On the contrary—and I may say it at once—the phrase in this agreement cannot, in my judgment, as matter of construction, be held to describe either the "profits" of the Act of 1915 or the profits and gains of the Income Tax Acts. And, in searching for what it does describe, we have not in this agreement the same

(1) [1917] 1 K. B. 527.

assistance from the words used that was forthcoming in, I think, all the other cases on the subject. Indeed, each of these cases might have been decided as they were by reference to the actual words without further inquiry into principles. The phrase here, however, is not so clear, although the agreement apart from the words themselves is not lacking in some indications as to what is being pointed at.

First of all, the profits are "the net profits for the year of the company's business"—a circumstance of some little significance, in that the employment of the defendant is not for other purposes fixed with reference to any such year. Again, the defendant's share of these "net profits" is to be paid to him within seven days of the holding of the annual general meeting of the company, that is to say, that, unlike his fixed remuneration which is payable to him by monthly instalments, he is to have his agreed share of profits within seven days of the meeting at which these profits as a whole would in the usual course be divided or applied. And we have this additional circumstance, which naturally leads to what I believe to be the true conclusion of the whole matter: the certificate of the company's auditor is not to be, as it might have been, a certificate of the actual amount payable to the defendant, but is to be a certificate of "what constitute the net profits (if any) as aforesaid at the end of any such business year of the company," that is to say, a certificate of the whole net profits. In truth, this part of the agreement is in its essence a profit-sharing arrangement in which there is implicit the assumption that the subject-matter of division exists as a fund for division between the participants, and, just as Peterson J. arrived at that conclusion in *In re Condran* (1), upon an agreement not materially different from the present, so I here arrive at the conclusion that the "net profits" of the business for the year are the excess of the receipts for the year over the current expenses and outgoings of the same year; or, putting it otherwise, they are the fund which for that year is capable of being lawfully applied by the company to the payment of a dividend.

(1) [1917] 1 Ch. 639.

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The question then arises: Could such a fund of so-called "net profits" be lawfully applied in payment of dividend if there were left out of account, outstanding and unsatisfied, the excess profits duty for the same year, which in terms of the statute is "a debt due to His Majesty" by the company. The question so put admits I should have thought only of one, and that a negative, answer. And that was the answer given to it by Peterson J. in the two cases under the Act which have come before him: *Collins* v. *Sedgwick* (1) and *In re Condran.* (2) The different view has been either indicated or taken in three cases by Rowlatt J. in *Thomas* v. *Hamlyn & Co.* (3); by Eve J. in *William Hollins and Co.* v. *Paget* (4); and by Neville J. in *S. J. and E. Fellows* v. *Corker* (5)—and I must accordingly examine these decisions to see whether they affect the answer which, apart from them, I should have thought was right, and whether, even if they do, it is still open to me to follow Peterson J.'s decision should I still remain unconvinced by them.

Now it will be found that such divergence of judicial view as exists in this matter is attributable to the analogy which in the three cases referred to is treated as existing between the incidence of income tax and that of excess profits duty. It had been held in *Attorney-General* v. *Ashton Gas Co.* (6) with reference to income tax that the amount of that tax was part of the profits of the company available for dividends; it had been held also by Sargant J. in *Johnston* v. *Chestergate Hat Manufacturing Co.* (7), applying the *Ashton Gas Co.* decision to an agreement like the present, that the manager there was entitled to have his percentage of net profits ascertained before deduction therefrom of the income tax. It was accordingly held or indicated in each of the three cases referred to that his percentage of profit would by analogy be ascertainable without reference to excess profits duty. It is true that this view did not, as I have already suggested, necessarily produce the

(1) [1917] 1 Ch. 179.
(2) [1917] 1 Ch. 639.
(3) [1917] 1 K. B. 527.
(4) [1917] 1 Ch. 187.
(5) [1918] 1 Ch. 9.
(6) [1904] 2 Ch. 621.
(7) [1915] 2 Ch. 338.

actual decision in any of the cases. The same result, having regard to the terms of the agreement in question, would or might in each case have been reached even if that view had not been held or indicated. I cannot conceal from myself, however, that the present case cannot fairly be decided without adhering to the view that the analogy exists for some relevant purpose or to the view that it does not. I must therefore examine the matter further.

In my opinion the only thing really decided in *Attorney-General* v. *Ashton Gas Co.* (1) was that, when a company pays income tax in respect of the profit which it divides, it pays the tax on behalf of its participating shareholders who do not then have to pay the tax themselves. So much is this so that if a shareholder is entitled to exemption he can recover the tax paid on his behalf from the Revenue. This is very clearly put by the present Master of the Rolls in *Brooke* v. *Inland Revenue Commissioners.* (2) "Where the duty is paid," says Swinfen Eady L.J., referring to *Attorney-General* v. *Ashton Gas Co.* (1), "by a company in respect of the gains and profits of its business it pays the income tax as agent for its shareholders, and in that way it is the shareholders, as the persons beneficially concerned, who bear the burden of the tax." And Scrutton L.J. in the same case, commenting on the *Ashton Gas Co. Case,* says (3): "I am quite clear that a company in paying income tax at the source at any rate pays as agent of the shareholders." In other words, the observations in *Attorney-General* v. *Ashton Gas Co.* (4) of Buckley J., so often cited, must be read in that light: "The income tax is part of the profits—namely, such part as the Revenue is entitled to take out of the profits. A sum which is an expense which must be borne whether profits are earned or not, may no doubt be deducted before arriving at profit. But a proportionate part of the profits payable to the Revenue is not a deduction before arriving at, but a part of, the profits themselves." In the truest sense income tax not only is,

(1) [1904] 2 Ch. 621.
(2) [1918] 1 K. B. 257, 267.
(3) [1918] 1 K. B. 270.
(4) [1904] 2 Ch. 624.

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but it remains, part of a company's profits distributed by it as dividend. The tax never ceases to be part of the company's profits so distributed because the company never pays the tax. That tax is paid not by the company out of its distributed profit but by the shareholder out of his dividend. And it must be noted that in *Attorney-General* v. *Ashton Gas Co.* (1) the great struggle, especially in the Court of Appeal, was to show that in the case of a gas company the income tax was really a debt of the company, a charge on its profits before the time came for their distribution among the shareholders. The contention failed, but it is clear that if it had succeeded the decision of Buckley J. would have been reversed. But the excess profits duty is a debt of the company by the express words of the statute imposing it. This new duty, therefore, is in that respect the very thing which the appellants in the *Ashton Gas Co.'s Case* (1) found that income tax on a company's distributed profits was not. On the whole matter I cannot do better than now read the following passage from the judgment of Peterson J. in *In re Condran* (2), which seems to me to be demonstrably right: "Income tax is ultimately payable by the person who is entitled to receive the profits. A company pays income tax on behalf of the shareholder and the income tax payable on his dividend is treated as part of his dividend, so that if he is in fact entitled to exemption he can recover the amount of the tax from the Revenue authorities. So too, in the case of partners, while a firm normally makes the returns and pays the tax a partner may claim exemption and be separately assessed (s. 168 of the Income Tax Act, 1842, Sched. D, Rule 3, 'Duty on trade carried on by two or more persons—How to be charged'). It is, of course, impossible to treat such a duty as an outgoing of the business. Excess profits duty on the other hand is assessed on the person owning or carrying on the business and is recoverable as a debt from him (s. 45 of the Finance (No. 2) Act, 1915), and is payable in respect of the profits of the business, and not in respect of the benefit which a shareholder or partner derives from the business; and it is impossible for any shareholder or

(1) [1904] 2 Ch. 621. (2) [1917] 1 Ch. 639, 644.

partner to claim a return or any portion of the duty on the ground that his total income is such as to entitle him to exemption; for the tax is a duty on the amount of the aggregate excess profits earned by the business. Nor are excess profits duty and income tax payable in respect of the same fund; for excess profits duty is for the purpose of income tax treated as an outgoing of the business which reduces the profits in respect of which income tax is assessable (s. 35 of the Finance (No. 2) Act, 1915). It is no doubt true that both taxes are payable in respect of profits, but they are not payable in respect of the same profits, and it seems to me impossible, if income tax is payable in respect of nett profits, to say that excess profits duty is also payable in respect of nett profits, inasmuch as the former is payable in respect of a sum which is ascertained after deducting the latter. In my view excess profits duty is, under ss. 38 and 45 of the Finance (No. 2) Act, 1915, a debt due to the Crown, the amount being ascertained with reference to the amount by which the profits exceed the pre-war standard." To that I would only add that the question whether the principle of *Attorney-General* v. *Ashton Gas Co.* (1) applies to the income tax on profits or gains of a company which it does not divide still, in my judgment, remains open. That point has never yet, I think, been consciously dealt with judicially.

I may proceed now to discuss the three cases. The first is *Thomas* v. *Hamlyn & Co.* (2) There the plaintiff was engaged as manager of four of the numerous branches of the defendants' business, his remuneration being a commission of 15 per cent. of the "net profits" of those four branches treated as a whole. There the learned judge decided, as I have already said on the special circumstances of the case, that excess profits duty, being only assessable in respect of the profits of the entire business, could not be deducted for the purpose of ascertaining the net profits of part of it. His actual decision, therefore, does not affect the present case. But in the course of his judgment he made the following general observations (3): "In the simple case of a business

(1) [1904] 2 Ch. 621. (2) [1917] 1 K. B. 527.
(3) [1917] 1 K. B. 530.

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without any branches where a manager is entitled to a percentage upon the net profits, is the excess profits duty to be deducted before ascertaining those net profits ? It is conceded that income tax could not be deducted in such a case, for the plain reason that the percentage is a charge upon profits and income tax is a tax upon profits, and both the percentage and the tax are claims upon the same fund and both must be paid in full out of that fund. It is contended that the excess profits duty is not income tax ; but, except that there are variations in the method of computation, I cannot see what else it is but an income tax. It is tax upon the profits made during the year in so far as they exceed a certain standard. There are, indeed, distinctions with respect to the allowances and deductions, but they do not make it different from income tax. Excess profits duty is simply a claim by the Government to take a share of the profits just as in the case of income tax. With respect to the profits, the manager entitled to a percentage and the Government to duty both come in on the same footing and both must be paid in full." The learned judge's conclusion appears to be based upon the view that the reason why in such a case income tax cannot be deducted is that the income tax and the percentage are charges upon the same fund, and that both must be paid in full out of that fund. But I am bound, I think, on the examination of *Attorney-General* v. *Ashton Gas Co.* (1) to conclude that the reason is different. That examination, as above appears, shows that income tax is not deducted in such circumstances because it is not a charge on the company's fund at all. It is not paid by the company out of its profits : it is paid by the shareholder out of his dividend. Again, if the conclusion involves the view that the excess profits duty and the percentage are charged upon the same fund, that certainly is not, for the reasons I have already given, the case here. The two funds are different. But I doubt, even if they were the same, whether it would follow that both duty and percentage must come in on the same footing and

(1) [1904] 2 Ch. 621.

both be paid in full. They are not both charged by the same instrument. The one is charged by statute; the other by an agreement subsequent to the statute and operative only after the action of the statute is complete. If, for instance, the statute had charged the excess profits tax on the net profits of a company distributable as dividend, it would not at all have followed that the provisions of a subsequent service agreement conferring a percentage in identical words would operate on the same fund; though such provisions would doubtless so operate if contained in the same statute. The element of priority, always present, may in the case of certain descriptive expressions be decisive of the result. It appears to me, therefore, for all these reasons, that I am not at liberty, much less bound, to follow *Thomas* v. *Hamlyn & Co.* (1)

William Hollins & Co. v. *Paget* (2) before Eve J. may be dealt with more shortly because I am not sure that the learned judge really acted on the view that there was any analogy between income tax and excess profits duty in this matter. The income tax cases are not cited in his judgment, while in the agreement before him the percentage was charged on profits *made* during the financial year; and in the view taken by the learned judge of the true effect of that agreement it would seem that his conclusion was inevitable. He does, however, by a reference to s. 49 of the Act of 1916, appear to indicate that excess profits duty is like income tax paid by the company on behalf of the shareholders. He says (3): "I think some light is thrown on the matter by s. 49 of the Finance Act, 1916. By sub-s. 2 of that section it is provided that if the Commissioners refuse to allow a deduction in respect of any increase in the remuneration of a director of any business, and the company is required to pay excess profits duty in respect of the disallowed deduction, the company may recover from the director the amount paid by way of excess profits duty in respect of the increase, and the amount

(1) [1917] 1 K. B. 527. (2) [1917] 1 Ch. 187.
(3) [1917] 1 Ch. 192.

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so recovered is to be treated as excess profits duty paid by the director and not by the company. The justification for recovering from the director this proportion of the excess profits duty paid by the company must surely rest on this, that the payment has been made by the company on his behalf, and this can only be the case where his increased remuneration is calculated on the entirety of the excess profits." I do not take that view of the sub-section. The remuneration there referred to is not necessarily directed to one based on profits nor is it confined to a remuneration so based. It extends to any increased remuneration disallowed; and the purpose of the sub-section is to prevent the Revenue getting excess profits duty twice over in respect of the same profits. It charges the company with duty on the increase by disallowing that increase as an outgoing; it leaves the company to recover from the director the duty for which on that increase he remains liable to the Crown. But the company does not pay the duty on the director's behalf. He does not get a discharge from it by the payment the company makes. He is only discharged when he pays his duty to the company. Incidentally this sub-section shows that, so far as a director is concerned, the question raised on this summons must in many cases be of slight importance.

S. J. and E. Fellows, Ld. v. *Corker* (1), before Neville J., is nearer the present case. There too, however, the agreement, made before the Act, while fixing the percentage with reference to net profits, defined them as being "the gross profits earned by the company" less certain deductions in which the excess profits duty was not included, either, of course, expressly or under any sufficient form of words by anticipation. The decision, therefore, of the learned judge that no allowance must be made in respect of them could not, as it respectfully appears to me, have been otherwise than it was. After reviewing all the authorities, however, the learned judge on the general question expresses himself thus (2): "Have I in coming to a conclusion as to what 'net profits' mean really to decide whether distinctions can or cannot be made

(1) [1918] 1 Ch. 9. (2) [1918] 2 Ch. 16.

between income tax and excess profits duty, or is the question really determined by the view stated by Buckley J. in *Attorney-General* v. *Ashton Gas Co.* (1), that in arriving at what are profits you cannot deduct payments which have to be made, not in any case, but only in case the profits themselves are made, or, to put it quite shortly, in ascertaining the profits you cannot deduct a charge upon the profits before you ascertain what the profits are? The latter is what I think is meant by the words used, and that seems to me the true test of the proposed deduction from net profits." The learned judge there, like Rowlatt J., appears to proceed upon the footing that the "profits" on which the excess profits duty is charged are the same as "the net profits of the business" on which the percentage is charged; and he expresses, on that hypothesis, the view that for the purposes of the percentage the duty must be disregarded. I have already indicated the reasons why I cannot agree with this view either of *Attorney-General* v. *Ashton Gas Co.* (1) or of the excess profits duty statutes.

It results, therefore, that no one of the three cases requires me to follow any other view than that which, apart from them, had appeared to me to be right. Further, I can see no sound distinction between this case and *In re Condran* (2), with which I find myself in entire agreement. I therefore follow it, and decide that the amount to be paid to the defendant at the end of each business year ought to be ascertained after deducting the excess profits duty payable by the plaintiffs in respect of such year.

Solicitors for plaintiffs: *Mackrell, Maton, Godlee & Quincey.*
Solicitors for defendant: *John B. & F. Purchase.*

(1) [1904] 2 Ch. 621 (2) [1917] 1 Ch 639.

A. L.

C. A.
1918
Nov. 25;
Dec. 2, 3.

In re WHITWORTH.

O'ROURKE *v.* DARBISHIRE.

[1915 W. 387.]

Practice—Discovery of Documents—Professional Privilege—Co-trustees—One Trustee acting as Solicitor to all the Trustees—Confidential Communications—Fraud—Allegation of—Sufficiency.

Where one of the trustees of a will is a solicitor and acts as the solicitor for the trustees, communications passing between him and his co-trustees, which would be privileged if the solicitor were not a trustee, are privileged, notwithstanding that he is a co-trustee.

In re Postlethwaite (1887) 35 Ch. D. 722 discussed.

If fraud or illegality is alleged as a ground for defeating the privilege attaching to the communications, there must be a definite charge of fraud or illegality; a mere suggestion or suspicion is not sufficient.

Decision of Peterson J. reversed.

APPEAL from an order of Peterson J. for production of documents in an action claiming administration and declarations as hereinafter stated.

Sir Joseph Whitworth (herein called the testator) died on January 22, 1887, possessed of real and personal estate of considerable value. The testator made a will and four codicils. The statement of claim alleged (so far as material) as follows: The said testamentary instruments were prepared by Richard Copley Christie and Robert Dukinfield Darbishire (both since deceased), and were executed under their advice, and the testator had no other or independent advice. By his will the testator appointed his wife, Christie, and Darbishire trustees and executors, and, after giving legacies to his wife and others, he bequeathed the residue of his personal property to certain school boards. By the first codicil he revoked one of the gifts for educational purposes, and he gave the property comprised in that gift and all other property not otherwise effectually disposed of to his wife, Christie, and Darbishire for their own absolute use and benefit in equal shares, it being his earnest wish that they would pay and apply the ultimate residue for such educational purposes as he had desired to promote by virtue of the provisions

of his will as they should think fit, but this expression of his wish should not be construed as imposing any legal fetter, obligation, or liability upon them. The codicil contained a provision that the said R. D. Darbishire should, notwithstanding he was an executor and trustee, be at liberty to act as solicitor of the testator's trust estate, and should be paid all proper costs, charges and expenses in like manner as if he were not an executor and trustee. By the second codicil he revoked the gifts to the school boards. By the fourth codicil the testator declared that the gift in his first codicil of all other property not effectually disposed of to his wife, Christie, and Darbishire for their absolute use and benefit in equal shares should include all his real and personal estate not otherwise disposed of, and he accordingly gave to them such real and personal estate in equal shares for their own benefit, having full confidence that they would desire to carry out his wishes to the utmost of their power, but nothing in the will or codicils should be construed to impose any trust upon his residuary legatees and devisees or in any manner to abridge or qualify their absolute ownership or rights. The testator during the period in which the will and codicils were signed was in a feeble state of health, both mentally and physically, and was entirely guided in his testamentary dispositions by the advice of R. C. Christie and R. D. Darbishire. Paragraphs 11 to 15 were as follows:—

"11. The plaintiff charges that (A) there was either a secret trust communicated to Whitworth's executors by the testator in respect of the testator's residuary real and personal estate and accepted by them which trust was never defined; or that (B) there was such a secret trust which was defined but was invalid by reason of the Mortmain Acts or otherwise; or that according to the terms of the will and codicils (C) Whitworth's executors took the said residuary real and personal estate for their own absolute use and benefit. 12. The plaintiff further charges that the form in which the testamentary dispositions of the testator was arranged or settled by the said Richard Copley Christie and Robert Dukinfield Darbishire was a mere fraudulent device or scheme for

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appropriating to the use of Whitworth's executors a very large portion of the testator's estate, and that the said Dame Mary Louisa Whitworth was a party to the said scheme or device either before or after the same was devised by the said Richard Copley Christie and Robert Dukinfield Darbishire and adopted and took the benefit of it. 13. The plaintiff will upon obtaining the declarations asked for by the prayer take if necessary proper steps in the Probate Division of this Court to recall the probate of the said will and codicils. 14. The testator had no issue. At the date of his death his heiress-at-law was Fanny Uniacke, the wife of Richard Uniacke, who was then domiciled in Queensland, Australia. She was the only child of the testator's only brother John Whitworth (then deceased), and she and Helen Spear McGowan (otherwise Ellen McGowan), the sister of the testator, were at his death the testator's only next-of-kin. 15. Whitworth's executors, well knowing that their said scheme or device would be entirely defeated if proper proceedings for that purpose were taken, having obtained possession of the testator's estate, adopted the steps hereinafter stated for the purpose of preventing or stopping any such proceedings, using for that purpose large sums forming part of the testator's estate."

The statement of claim then alleged in substance as follows: Richard Uniacke and Fanny Uniacke were, as stated above, domiciled in Queensland, and at the date of the testator's death the law of Queensland was in all material respects the same as the law of England before the Married Women's Property Acts; and therefore any personal estate of Fanny Uniacke, so far as it consisted of choses in action, passed to her husband if reduced into possession in his wife's lifetime, and if not so reduced passed on her death to her administrator. As regarded real estate in England she was entitled thereto for her separate use. The defendant, J. W. McGowan, the son of Helen McGowan, was on behalf of his mother threatening the executors with proceedings to impeach the will and codicils, and it was arranged between the executors and the defendant McGowan that the latter should procure the concurrence of Fanny Uniacke in any settlement. In consequence by a

deed dated August 26, 1889, Fanny Uniacke conveyed to the defendant McGowan one moiety of the real estate of the testator; and by a deed dated December 21, 1889, to which the defendant McGowan was a party, Fanny Uniacke and Helen McGowan, in consideration of the payment to them by the executors of a sum of money, conveyed, released, and confirmed unto the executors all the real and personal estate of the testator to the intent that the estate should be discharged from any claims by Fanny Uniacke, Helen McGowan, and the defendant McGowan thereto. Paragraph 25 stated that the executors were, as to the residuary real and personal estate trustees, subject to the rights of the testator's widow, for the testator's heiress-at-law and next-of-kin, and the course adopted by them in obtaining the execution of the deeds was part of a fraudulent scheme to retain for their own use a large part of the estate; and that the true material facts in relation to the testator's will and codicils were fraudulently concealed from Fanny Uniacke. Paragraph 26 stated that Whitworth's executors after the execution of the deeds proceeded to divide between themselves and to appropriate to their own use a considerable part of the real and personal estate of the testator. The three executors died before action brought and the defendants were their representatives. Fanny Uniacke died in 1908 and Richard Uniacke in 1909. Letters of administration de bonis non to the estate of Fanny Uniacke were granted to the plaintiff in 1910, and on February 11, 1915, he brought the present action, the defendants being the legal personal representatives of the executors of Sir Joseph Whitworth's will, J. W. McGowan, and the executors of Helen McGowan, who died before action.

The plaintiff claimed:—

"(1.) A declaration that Whitworth's executors were (subject to the rights of the widow) trustees for the heiress-at-law and next-of-kin of the testator Sir Joseph Whitworth of all his residuary real and personal estate, or in the alternative of two third parts thereof. (2.) To have the said real and personal estate administered. (3.) To have, if

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necessary, the said indentures of the 26th day of August, 1889, and the 21st day of December, 1889, set aside and cancelled, or in the alternative a declaration that such indentures respectively are not binding on the said Fanny Uniacke or on the plaintiff as her legal personal representative, or in the further alternative that the said indentures respectively did not pass the said real or personal estate as against the plaintiff as such legal personal representative. (4.) To have the real and personal estates of the said Dame Mary Louisa Whitworth, Richard Copley Christie, and Robert Dukinfield Darbishire respectively administered unless their respective executors shall admit assets. (5.) All necessary accounts and inquiries on the footing of wilful default. (6.) A receiver. (7.) An injunction."

The defence of the defendants (except the defendant McGowan and Helen McGowan's executors, who delivered separate defences) was, in substance, a denial of the charges made against the executors. It further stated that Richard Uniacke was on November 20, 1865, declared insolvent in Tasmania, and after his marriage the trustee in the bankruptcy on April 11, 1896, released and confirmed unto Whitworth's executors the real and personal estate of the testator and all claims in respect thereof; and that in 1893 R. Uniacke was adjudged insolvent in Queensland, and the trustee in that bankruptcy executed a similar release. Two of the defendants, Otto Vernon Darbishire and Arthur Henry Worthington, made an affidavit of documents, in which they stated (so far as material) that they had in their possession or power the documents relating to the matters in question set forth in the first and second parts of the first schedule thereto, and that they objected to produce the documents in the second part of the schedule on the ground that the same were from their nature privileged, and that according to the best of their knowledge, information and belief they had not then and never had in their possession, custody or power, or in the possession, custody or power of their solicitors or agents or any other person on their behalf any document relating to the matters in question in the suit other than the documents set forth in the first schedule thereto.

The first part of the schedule set out a list of documents numbered 1 to 433. The second part set out certain documents numbered 434 to 438, which were more particularly described in the further affidavit of documents. The question in the appeal related to the documents numbered 434, 436, and 437. A further affidavit was ordered, and it stated as follows :—

" 3. The documents mentioned and numbered respectively 434, 436, and 437 in the second part of the said first schedule to the said (first) affidavit are more particularly specified and identified and have the same numbers attached in the second schedule to this affidavit.

" 4. We object to produce the last-mentioned documents numbered 434 and 436 and (except as hereinafter appears) we object to produce the documents numbered 437 on the following grounds : As to the documents numbered 434, such documents consist solely of professional communications of a confidential character passing as regards that numbered 1 between the testator Sir Joseph Whitworth and his counsel, and as regards that numbered 2 between Dame Mary Louisa Whitworth, Richard Copley Christie, and Robert Dukinfield Darbishire the executors appointed by the will of the said testator (who are for convenience hereinafter referred to as the Whitworth executors) and their counsel for the purpose of obtaining legal advice. As to the documents numbered 436 in the second part of the schedule to our said affidavit and in the second schedule to this affidavit the same consist solely of professional communications of a confidential nature which for the purpose of the said Whitworth executors or some or one of them obtaining legal advice have passed between them and their solicitors, Messrs. Darbishire and Tatham, Messrs. Darbishire, Tatham and Worthington, or Messrs. Cookson & Co. from time to time advising on their behalf or on behalf of some or one of them. As to the documents numbered 437 in the second part of the schedule to our said affidavit, the notes and memoranda were made, prepared, or procured by the said Whitworth executors after the death of the said testator which occurred on the 22nd January, 1887, and in view of the claims made against them in relation to the

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testator's estate and the legal proceedings from time to time threatened or commenced against them relating to the said testator's estate, and were made solely for the purpose and with the intention of the same being laid before the solicitors to the Whitworth executors confidentially and in their professional capacity in order to obtain their legal advice. The entries in the diaries so far as we object to produce the same are entries in diaries kept since the death of the testator by the said Robert Dukinfield Darbishire as a member of the said firm of Darbishire and Tatham, or Darbishire, Tatham and Worthington, or by the said Cookson & Co., in his or their business respectively as solicitor or solicitors from time to time for the said Whitworth executors. The drafts and copies of bills of costs which we object to produce are the drafts and copies of bills of costs subsequent in date to the death of the testator of Messrs. Darbishire and Tatham, Messrs. Darbishire, Tatham and Worthington, or Messrs. Cookson & Co. against the said Whitworth executors. The said entries in the said diaries and the said bills of costs relate solely to the said claims and the said threatened or commenced legal proceedings. To the best of our knowledge, information, and belief the said documents numbered 434, 436 and (so far as we object to produce the same) 437 either do not in any way relate to the matters in issue in this action, or in so far as they do relate to the same relate solely to our case and to the case of our said co-defendants and not to the case of the plaintiff, and do not in any way tend to support the plaintiff's case or impeach our own."

The documents numbered 434 in the second schedule were drafts and fair copies of cases and instructions to counsel and opinions of counsel: (1.) Draft of case and fair copy case and opinion of Mr. Theobald. (2.) Draft of case and two fair copies of case and joint opinion of Sir Horace Davey, Q.C., and Mr. G. P. C. Lawrence. The documents numbered 436 in the second schedule were: "Letters and telegrams from the above-named Dame Mary Louisa Whitworth to the above-named Robert Dukinfield Darbishire (as a member of the said firms of Darbishire and Tatham, or Darbishire,

Tatham and Worthington, solicitors advising the Whitworth executors as aforesaid)" from June 6, 1889, to April 17, 1892. Similar letters and telegrams from R. C. Christie to the said R. D. Darbishire as a member of the said firms of solicitors advising the executors from December 15, 1888, to February 17, 1896, and press copy letters and telegrams from the said R. D. Darbishire as a member of the said firms advising the executors to Lady Whitworth between January 24, 1887, and May 9, 1896, and to the said R. C. Christie between January 24, 1887, and July 19, 1900; and also letters and telegrams and press copy letters and telegrams passing between Richard Pennington (Cookson & Co., solicitors advising the Whitworth executors) and either the said R. C. Christie, as one of the Whitworth executors, or the said R. D. Darbishire as one of the executors, from 1889 to 1904.

The documents numbered 437 consisted (so far as material) of "entries relating to the said claims or contemplated or pending litigation in 13 diaries of the said R. D. Darbishire kept by him in the course of his business as a partner in the said firms of Darbishire and Tatham, or Darbishire, Tatham and Worthington, solicitors, from 1884 to 1892 inclusive, and from 1897 to 1903 inclusive"; 52 bills of costs of Darbishire and Tatham, or Darbishire, Tatham and Worthington against the Whitworth executors from 1887 to 1898; and 21 bills of costs of Cookson & Co. against the Whitworth executors from 1889 to 1897. The plaintiff took out a summons for production of the documents. As to the documents numbered 434, Peterson J., on the authority of *Russell* v. *Jackson* (1), held that as the document No. 1 had come into existence in the lifetime of the testator it should be produced; and that as to document No. 2, though the plaintiff was not entitled as a cestui que trust to see it, the question in the action being whether he was a cestui que trust (*Talbot* v. *Marshfield* (2); *Wynne* v. *Humberston* (3)), having at the invitation of the defendant's counsel looked at it, he thought that the plaintiff ought to have an opportunity of seeing it. As to the

(1) (1851) 9 Hare, 387. (2) (1865) 2 Dr. & Sm. 549.
(3) (1858) 27 Beav. 421.

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documents numbered 436 the learned judge said that the plaintiff was not entitled as a beneficiary to see them, as he must first establish a prima facie case that he was a beneficiary; but that having regard to the decision in *In re Postlethwaite* (1) communications passing between the executors, one of whom was also acting as solicitor advising the executors, were not privileged, and he ordered their production. Nor were the defendants exempted from the necessity of producing the documents by reason of the statement in the affidavit that they did not support the plaintiff's case, and only tended to support their own case (and this claim for exemption applied to all the documents numbered 434, 436, and 437), because having seen the document No. 2 in 434 he could not say that it might not tend to support the plaintiff's case, and therefore he came to the conclusion that the defendants had not approached the question from the proper point of view, and had misapprehended the effect of the documents or failed to recognize that some of them might be of use to the plaintiff's case. He, however, held that the communications between the executors and Messrs. Cookson & Co., who acted as solicitors to the executors, were privileged, and the fact that there was a charge of fraud did not destroy the privilege, there being no suggestion or allegation that Messrs. Cookson & Co. were in any way implicated in the alleged scheme or consciously or unconsciously assisted in promoting it. As to the documents numbered 437 the learned judge said that the diary entries relating to business done by Darbishire for the executors and the bills of costs of Darbishire's firm stood upon the same footing as communications between Darbishire and the other executors, and must be produced; but that Messrs. Cookson & Co.'s bills of costs against the executors were privileged from production, as also were the notes and memoranda mentioned in the body of the second affidavit.

The defendants appealed, and the plaintiff gave notice of cross-appeal.

(1) 35 Ch. D. 722, 726.

Tomlin K.C. and *Hogg K.C.* (*Dighton Pollock* with them) for the defendants. The fact that one of the trustees and executors was a solicitor who acted as solicitor to the trustees and executors does not destroy the privilege which would attach to the documents if the solicitor advising the executors was not himself a trustee and executor. The learned judge, in holding that the documents passing between the solicitor trustee, advising the trustees as their solicitor, and the other trustees were not privileged, purported to follow the decision of North J. in *In re Postlethwaite.* (1) That case does not support the view taken by the learned judge. The plaintiffs there were admittedly persons beneficially interested in the will of the testator, and were entitled to see the trust documents. Another ground of the decision was that there was an allegation of fraud and the documents came into existence as part of the perpetration of the fraud. If the passage in the judgment of North J. (2) means that where one trustee acts as the professional adviser of the other trustee privilege does not attach, it is wrong. In *Hamilton* v. *Nott* (3) it was held that letters passing between one defendant, who was a solicitor and acted as agent for the solicitor on the record to collect evidence in the case, and his co-defendant were privileged communications.

It is then said that the plaintiff here charges fraud and that therefore the protection of professional privilege is destroyed. There must however be "some definite charge either by way of allegation or affidavit or what not": per Lord Halsbury L.C. in *Bullivant* v. *Attorney-General for Victoria.* (4) There is no charge of fraud in the statement of claim. The principle is that "where a solicitor is party to a fraud, no privilege attaches to the communications with him upon the subject, because the contriving of a fraud is no part of his duty as solicitor": per Turner V.-C. in *Russell* v. *Jackson.* (5) Communications made to a solicitor

(1) 35 Ch. D. 722.
(2) Ibid. 726.
(3) (1873) L. R. 16 Eq. 112.
(4) [1901] A. C. 196, 201.
(5) 9 Hare, 387, 392.

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by his client before the commission of a crime for the purpose of being guided or helped in the commission of it, are not privileged from disclosure: *Reg.* v. *Cox.* (1) Prima facie the professional communication is privileged, and the plaintiff before he can require production must either show that he is a cestui que trust and not a mere claimant, and that therefore the trustee must produce the document (*Wynne* v. *Humberston* (2)), or make some definite charge of fraud. The plaintiff has not shown either of these matters.

Next, even if there is no professional privilege, the documents are protected by the oath that they do not relate to the plaintiff's case or impeach the defendants' case unless the Court is reasonably satisfied that the defendants have misconceived the nature of the documents: *Minet* v. *Morgan* (3); *Bewicke* v. *Graham* (4); *Attorney-General* v. *Emerson* (5); *Bulman* v. *Young, Ehlers & Co.* (6); *Roberts* v. *Oppenheim* (7); *Frankenstein* v. *Gavin's House-to-House Cycle Cleaning & Insurance Co.* (8) The learned judge was therefore wrong in ordering production of the documents.

As regards the documents numbered 434 the plaintiff cannot require production of the document No. 1 until the release executed by Mrs. Uniacke has been set aside, and he has proved himself to be a cestui que trust. The document No. 2 falls under the same protection as the documents numbered 436 and 437.

Hughes K.C. and *J. B. Matthews K.C.* (*Beddall* with them) for the plaintiff. If the Court comes with reasonable certainty to the conclusion that the nature of the documents has been misconceived or misrepresented, it may go behind the oath in the affidavit that the documents relate only to the defendants' case and not to the plaintiff's case, and do not impeach the defendants' case: *Combe* v. *London Corporation* (9); *Attorney-General* v. *Emerson* (10); *British Association of Glass*

(1) (1884) 14 Q. B. D. 153.
(2) 27 Beav. 421.
(3) (1873) L. R. 8 Ch. 361.
(4) (1881) 7 Q. B. D. 400.
(5) (1882) 10 Q. B. D. 191, 198.
(6) (1883) 49 L. T. 736.
(7) (1884) 26 Ch. D. 724.
(8) [1897] 2 Q. B. 62.
(9) (1842) 1 Y. & C. Ch. 631, 650, 651. Affirmed (1845) 15 L. J. (Ch.) 80.
(10) 10 Q. B. D. 199, 206.

Bottle Manufacturers v. *Nettlefold*. (1) If the Court is reasonably satisfied, as Peterson J. was, from inspection of one of the documents that it tends to support the plaintiff's case, the affidavit as to the other documents cannot be relied upon and the Court will order production of all: *Ponsonby* v. *Hartley*. (2) See also *Hey* v. *de la Hey*. (3) The same principle applies to professional privilege. If the Court sees that the documents cannot all be covered by the protection of privilege, it will order production or a further affidavit. It is incredible that all the long correspondence came into existence for the purpose of obtaining legal advice, or that none of the documents relates to the plaintiff's case. The Court will look carefully at the affidavit claiming privilege, and it is in its discretion to order production. Whether documents tend to support the plaintiff's case or not is a matter largely of opinion. [*Manby* v. *Bewicke* (4) and *Taylor* v. *Batten* (5) were also referred to.]

Next, where there is an allegation of fraud the professional privilege is gone: *Reg.* v. *Cox* (6); *Reg.* v. *Bullivant*. (7) In the latter case in the House of Lords (*Bullivant* v. *Attorney-General for Victoria* (8)) this proposition was not disputed, but it was held that there was no averment there of fraud or illegality. In the present case there is a definite charge of fraud in the pleadings, and those allegations must be assumed to be true for the purpose of testing the right to production: per Lord Davey in *Bullivant* v. *Attorney-General for Victoria*. (9) [*Barham* v. *Lord Huntingfield* (10) was also referred to.]

Further, the learned judge was right in holding, on the authority of *In re Postlethwaite* (11), that privilege could not be claimed for communications between the three trustees. The second ground of the decision in that case, that "it is not open to trustees to act together in such a way—the

(1) [1912] A. C. 709.
(2) [1883] W. N. 44.
(3) [1886] W. N. 101.
(4) (1856) 8 D. M. & G. 476.
(5) (1878) 4 Q. B. D. 85.
(6) 14 Q. B. D. 153.
(7) [1900] 2 Q. B. 163, 169.
(8) [1901] A. C. 196.
(9) Ibid. 203, 204.
(10) [1913] 2 K. B. 193.
(11) 35 Ch. D. 722, 726.

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one acting as the professional adviser of the other—as to close the mouth of either of them in regard to matters relevant to the trust. If they do so act, they must take the consequence of that which they had done not being treated as privileged," applies to this case. It is clear that there is no privilege as between co-defendants, and the decision in *Hamilton* v. *Nott* (1) depended on very special facts. The principle is stated by Lord Cranworth in *Goodall* v. *Little* (2) thus: "It is equally clear that the third class is not protected. The letters in that class are letters from one co-defendant to another; and it is quite unimportant that they were written with a view to enable the party to whom they were addressed, to consult his solicitor upon them. That which might pass, between William and his solicitor, on the subject of those letters, would be protected. But there is no protection as to letters passing between parties themselves, or from a stranger to a party, merely because such letters may have been written in order to enable the person to whom they are sent to communicate them, in professional confidence, to his solicitor." There is no ground for saying that a solicitor trustee and his co-trustee are in a better position than lay trustees. The decision of the learned judge was right upon this point.

[SCRUTTON L.J. referred to *Jenkyns* v. *Bushby*. (3)]

[Bray on Discovery, pp. 422, 423, was also referred to. (4)]

No reply was called for.

BANKES L.J. This appeal raises an important question with reference to discovery of documents. The plaintiff is the administrator de bonis non of Mrs. Uniacke, who was the heiress-at-law and one of the next-of-kin of the testator, Sir Joseph Whitworth. The action is brought against a number of persons, including the legal personal representatives of the executors of Sir Joseph Whitworth. The statement of claim asks for certain declarations. [The Lord Justice read them.] One of the indentures referred to is a release by

(1) L. R. 16 Eq. 112.
(2) (1851) 1 Sim. N. S. 155, 163.
(3) (1866) L. R. 2 Eq. 547.
(4) Counsel for the plaintiff intimated that, if the Court was against them on the appeal, it would be useless to argue the cross-appeal, though they did not abandon it.

Mrs. Uniacke to the executors. The plaintiff is in this position, that he cannot maintain his claim unless that deed is set aside, and one of the grounds upon which it is sought to set it aside is, as I understand, that by the law of Queensland, where Mrs. Uniacke and her husband were domiciled, she had no right to execute the deed. Having regard to the nature of the action I should have thought that the proper course would have been to postpone making an affidavit of documents until the release had been set aside and the plaintiff had established his right to proceed further with the action. I do not know whether the affidavit was made voluntarily or not. However, that was not done, and an affidavit was made disclosing a mass of documents. There was in the first affidavit a general claim of privilege which was clearly insufficient. A further affidavit was ordered, and it is upon that affidavit that the claim for privilege arises.

The first question is whether the fact that one of the Whitworth executors was a solicitor and that the other executors consulted him as a solicitor in reference to the estate deprives the executors of any claim of professional privilege with reference to communications passing between the solicitor and his co-executors, or coming into existence in those circumstances. It is obvious that this question is an extremely important one, because there are a very large number of cases in which one of a number of trustees or executors is a solicitor and his co-trustees or co-executors employ him as solicitor to the trust and consult him in that capacity; and if communications passing between them in those circumstances are not privileged, and are to be treated as on a different footing from similar communications passing between the executors or trustees and a solicitor who was not an executor or trustee, the consequences would be far-reaching.

Peterson J. has decided, on the authority of *In re Postlethwaite* (1), that professional privilege cannot be claimed for documents passing between the other executors and the solicitor executor or coming into existence under the

(1) 35 Ch. D. 722.

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circumstances stated in the affidavit, and that the documents must be treated as though they passed between two co-defendants neither of whom was a solicitor. In my opinion *In re Postlethwaite* (1) is not an authority for that proposition. If it were it would not have been well decided. It is necessary to examine the facts of that case somewhat closely in order to see exactly what was decided. A testator appointed three trustees of his will, J. L. Postlethwaite, Rickman, and Tourle. Tourle was a solicitor. J. L. Postlethwaite was beneficially interested in the proceeds of sale of the testator's residuary real and personal estate, and after his death his children, who were entitled to his interest under the testator's will, brought an action against the executors of Rickman, who was dead, and Tourle, the surviving trustee, alleging that Rickman had made large illicit profits by himself purchasing part of the trust estate in the name of a person named Walker and reselling it. The plaintiffs sought to make the estate of Rickman and the defendant Tourle liable for the profits so made. The defendants, the executors of Rickman, made an affidavit of documents and claimed privilege from production for letters written by Tourle to Rickman and for Tourle's bills of costs, on the ground that they were professional communications of a confidential character between Rickman and Tourle, who in that matter was acting as Rickman's private solicitor and not as solicitor for the trust. North J. decided against the claim of privilege on three grounds. The first ground was, as stated in the judgment, that the statement of claim alleged that Tourle and Rickman were jointly engaged in concocting the fraud upon the trust estate, and the learned judge, being satisfied that that was alleged definitely and as a genuine case, held upon the authorities that professional privilege could not be claimed for documents which came into existence in those circumstances. That ground is not material to the present point. I need not refer to the third ground. The second ground is that which is relied upon as an authority for the proposition that where one of a number of trustees is consulted as a solicitor by his co-trustees in relation to the trust, professional privilege cannot be claimed

(1) 35 Ch. D. 722.

for communications passing between them. It seems to me that the learned judge's decision proceeded on the ground that the plaintiffs were in a position to say that they were beneficially interested in the estate, and therefore had a proprietary right to see the documents. There is ample authority for that proposition. Therefore the second ground upon which North J. decided that case was that of a proprietary right in the documents. If that is so, that case is of no authority in the present one, because, as pointed out by Peterson J., the plaintiff has not yet established that he has any proprietary right to the documents in respect of which professional privilege is claimed. I need only say this further about the second ground of the decision in *In re Postlethwaite* (1): that, if North J. did decide the point contended for by the plaintiff, in my opinion the decision has no authority to support it, and is contrary to principle—namely, that in the absence of fraud the Court will extend protection to documents which have passed confidentially between solicitor and client. I think that Peterson J. was wrong in taking the view he did of the second ground of decision in *In re Postlethwaite* (1), and this disposes of the appeal because the professional privilege claimed covers all the documents. They are numbered 434, 436, and 437. As to the first item in 434, Peterson J. decided against the claim of privilege upon the authority of *Russell* v. *Jackson*. (2) In my opinion that item is governed by the principle that he who claims to see a document under a proprietary right must first establish the existence of that right. The plaintiff has not done so, and must fail as to that item as well as in regard to the other documents.

It is said however that even assuming professional privilege can exist, there is a charge of fraud alleged in the statement of claim which deprives the defendants of their right to refuse production. Production of documents is a matter within the discretion of the Court: Order XXXI., r. 18; *Hope* v. *Brash*. (3) It can be laid down as a general rule that, if a

(1) 35 Ch. D. 722. (2) 9 Hare, 387.
(3) [1897] 2 Q. B. 188.

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solicitor is shown to have been actively engaged with his client in concocting a crime or a fraud and in carrying it out, or if, having been so engaged, he and the client together are engaged in covering up the traces of their wrongdoing, the Court will not recognize any claim of privilege in reference to any documents passing between the solicitor and the client which have come into existence in the course of such a proceeding. To do so would be to lend the assistance of the Court to the commission of crimes and fraud. It is however a very different proposition to say that upon the mere suggestion of such a state of things the Court will never recognize a claim of privilege in reference to documents said to have come into existence in relation thereto. It has been contended that the mere allegation in a statement of claim of fraud between the solicitor and the client is sufficient to induce the Court to refuse to recognize the claim of privilege. I do not think that there can be any general rule on this matter. Each case must depend upon its own circumstances. There may be cases in which the mere allegation in the statement of claim is sufficient. On the other hand there may be cases in which the statement of claim or other document relied upon, when looked at, will indicate that the case made is a mere fishing case, what I may call a bow drawn at a venture; that it is a mere pleader's statement put forward in the hope that it may result in permission being given to inspect all documents in the possession of the other side and that some materials may be discovered on which to found a case. If that is the conclusion at which the Court arrives, it cannot be right that it should lend its assistance by giving discovery.

The statement of claim in the present case does not allege any definite charge of fraud. It is manifest, in my view, that the pleader had no materials before him which would enable him to state definitely what was the fraud complained of. The two paragraphs in the statement of claim which must mainly be relied upon as disclosing a charge of fraud are 11 and 12. In paragraph 11 the plaintiff charges three inconsistent alternatives, in none of which is fraud a necessary element. If (clause A) there was a secret trust undefined,

that does not either directly or indirectly involve the executors in any fraud. As to clause B, it may well be that the testator desired to create a secret trust for the very purpose of defeating the Mortmain Acts, and if that wish were communicated to his executors it cannot be said that they were guilty of any fraud in connection with that matter. As to clause C, according to the will and codicils the executors took the residuary real and personal estate for their own use and benefit. Then paragraph 12 charges that the form in which the testamentary dispositions were arranged or settled by Christie and Darbishire was a mere fraudulent device or scheme for appropriating to the use of the executors a large portion of the testator's estate, and that Lady Whitworth was a party thereto. It seems to me that there is nothing in those two paragraphs amounting to any definite charge of fraud, or at any rate such a charge of fraud as would induce the Court to say that the case was one in which the claim of privilege could not be maintained. It is true that in subsequent paragraphs it is alleged that the executors fraudulently disposed of the estate. But that is an allegation which has any effective meaning only on the assumption that paragraphs 11 and 12 state a real substantial case of fraud. In my view, the statement of claim is so vague and indefinite, and so suggestive of the absence of any knowledge of the existence of the fraud which it charges, that the Court in the exercise of its discretion will not refuse to allow the claim of professional privilege for these documents.

This view is entirely in accordance with what Lord Halsbury L.C. said in *Bullivant* v. *Attorney-General for Victoria*. (1) In that case the Court of Appeal (2) considered that there was a charge of illegality or fraud alleged; the House of Lords was of opinion that there was not. It is in reference to that state of things that Lord Halsbury's language must be considered. He said (3): "I think the broad propositions may be very simply stated: for the perfect administration of justice, and for the protection of the confidence which

(1) [1901] A. C. 196. (2) [1900] 2 Q. B. 163.
(3) [1901] A. C. 200.

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exists between a solicitor and his client, it has been established as a principle of public policy that those confidential communications shall not be subject to production. But to that, of course, this limitation has been put, and justly put, that no Court can be called upon to protect communications which are in themselves parts of a criminal or unlawful proceeding. Those are the two principles. . . . . On the other hand, if it is sufficient for the party demanding the production to say, as a mere surmise or conjecture, that the thing which he is so endeavouring to inquire into may have been illegal or not, the privilege in all cases disappears at once. The line which the Courts have hitherto taken, and I hope will preserve, is this—that in order to displace the prima facie right of silence by a witness who has been put in the relation of professional confidence with his client, before that confidence can be broken you must have some definite charge either by way of allegation or affidavit or what not." Then, after referring to *Simms* v. *Registrar of Probates* (1), he continued: "That being so, my Lords, it appears to me that it would be an abandonment of the principle which has been held sacred in this country if, when a person has done that which in itself may be innocent, you should simply, because you choose to suggest that it was done with the view of evading the payment of a tax, require the witness to disclose the whole of his affairs, and enable the private communications between himself and his solicitor to be displayed to the Court."

I think that the speech of Lord Halsbury indicates that the Court ought not to refuse the protection in a case in which it comes to the conclusion upon the materials before it that the allegation of fraud is a mere suggestion. Peterson J. also took the view, as I read his judgment, that the allegations of fraud were not sufficient to support the claim for production of the documents; but, as I have said, he decided the case on the authority of *In re Postlethwaite*. (2)

There is another point which Peterson J. decided, and which we should have had to decide if we had taken the same view

(1) [1900] A. C. 323. (2) 35 Ch. D. 722.

as he did of the question of professional privilege. The affidavit states that the documents do not relate to the matters in issue, or so far as they do they relate solely to the defendants' case and not to the plaintiff's, and do not in any way tend to support the plaintiff's case or to impeach the defendants'. It is said that in the circumstances that cannot be true. It is enough to say that the claim is made in a form which has been held to be the right form. The Court may look at the documents which are sought to be covered by that claim, or it may, without inspection, come to the conclusion on sufficient materials that the person making the claim has misconceived his position or the nature of the documents, and on that ground may refuse to accept the oath as being a sufficient claim to protection. In this case the learned judge looked at one of the documents and came to the conclusion that the defendants' claim to protection could not be supported on that ground. If the only question had been as to the right to production of that particular document, having looked at it I should have agreed with the learned judge. But it is impossible, in my view, to justify his conclusion as to the great mass of documents in Nos. 436 and 437. If therefore the case had turned upon that, I should not have agreed with the learned judge. But having regard to the view which I have already expressed, that the claim of professional privilege covers all the documents, it is not necessary to base my judgment on the validity or otherwise of that claim to protection except to say that it is made in proper form. The appeal succeeds.

WARRINGTON L.J. This is an appeal from an order of Peterson J. directing production of certain documents. The grounds upon which the plaintiff contended that professional privilege could not be claimed were, first, that the solicitor with whom the communications took place was one of the executors of the will; and secondly, that the statement of claim alleged against the executors a case of fraud which made it impossible to maintain the claim of professional privilege.

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The testator died some twenty-eight years before the commencement of the present action. He appointed three executors of his will—his widow (Lady Whitworth), Mr. Darbishire (a solicitor), and Mr. Christie. The plaintiff in the action is the administrator de bonis non of a Mrs. Uniacke, who was one of the next-of-kin and the heiress-at-law of the testator. The general nature of the plaintiff's claim is a suggestion that, although by the testamentary dispositions of the testator the estate was given to the three executors beneficially, they were in reality, as the result of certain circumstances to which I will refer, trustees of that estate for the next-of-kin and the heiress-at-law.

The present appeal relates to three classes of documents which are numbered 434, 436, and 437 in the affidavit of documents; 434 consists of two cases for the opinion of counsel and the opinions thereon. One of these was submitted in the lifetime of the testator; the other after his death by the executors; 436 consists of a number of letters passing between Lady Whitworth and Darbishire, between Christie and Darbishire, and between Darbishire and Lady Whitworth and Christie; also similar communications passing between the executors, including Darbishire, and Messrs. Cookson as solicitors for the executors. Privilege is claimed as to all of those documents. The claim has been admitted by Peterson J. with regard to the communications between the executors and Messrs. Cookson, but it has been rejected by him in the case of the communications between Lady Whitworth and Christie and Darbishire; 437 consists of notes and memoranda, some of them contained in Darbishire's diaries, and some of them, as I gather, of another nature, and a large number of bills of costs rendered by Darbishire to the executors of the testator and containing, as such documents usually do, a record of the business transacted between the solicitor and his client. With regard to those again Peterson J. has rejected the claim of professional privilege.

The learned judge rejected the claim of privilege on two

grounds. The first ground was that Darbishire was himself one of the trustees, and that decision is founded upon *In re Postlethwaite.* (1) Before I examine that case I will deal with one ground on which the plaintiff's claim to production was put—namely, that these communications related to the testator's estate and came into existence at the instance of the trustees, and that therefore a beneficiary under the testator's will was entitled to see them as documents forming part of the testator's estate, that is to say, a proprietary claim. Peterson J., rightly I think, disposed of that claim by saying that the plaintiff had not yet made out his title to be a beneficiary under the testator's will. That is one of the questions in the action. At present he is by the terms of the testamentary dispositions excluded from any interest in the testator's estate.

I now turn to *In re Postlethwaite* (1) to see whether it decides that professional privilege cannot be claimed where the solicitor is himself a co-trustee with the person who seeks his advice as solicitor. In that case the plaintiffs were undoubtedly beneficiaries interested in the testator's estate. The dispute was this. It was said that Rickman, one of the three trustees under the will, had purchased a part of the testator's estate in the name of a person named Walker, and the object of the suit was to make the estate of Rickman and the other trustee, Tourle, who was a solicitor, liable for the profits arising from the purchase. The documents for which privilege was claimed were letters passing between Rickman and Tourle. According to the report of the argument the two grounds upon which the plaintiffs insisted that they were entitled to production, notwithstanding the claim of professional privilege, were (1.) what I have called the proprietary ground, and (2.) that, as alleged in the statement of claim, the purchase by Walker was a fraudulent device intended to conceal the real purchase by Rickman. North J. in his judgment stated three grounds, each of which was sufficient to defeat the claim of professional privilege. The first was the charge of fraud, and the third was a ground which, as the learned judge said, was peculiar

(1) 35 Ch. D. 722.

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to that case. I need not say anything about those two grounds. That part of his judgment which dealt with the second ground is the important one. He said (1): "Rickman and Tourle were acting together in relation to the trust estate. Tourle was himself one of the trustees, and he was the solicitor of all the trustees, and he also, in some totally independent matters, acted as Rickman's solicitor. In my opinion it is not open to trustees to act together in such a way—the one acting as the professional adviser of the other—as to close the mouth of either of them in regard to matters relevant to the trust. If they do so act, they must take the consequence of that which they had done not being treated as privileged." That is relied upon by the plaintiff as being an expression of opinion that the fact that the solicitor, with whom the communications passed, was a co-trustee with a person in the position of a client would of itself destroy the professional privilege. Read by itself, it would appear to have that meaning; but if it has, I think the learned judge stated that for which there is no authority. I see no reason why one of two trustees should not consult his co-trustee as solicitor—it may be his own family solicitor—in some matter relating to the trust, and so consult him as not to lose the benefit of the professional privilege should questions arise hereafter in which it was necessary to make that claim. I see no reason why the trustee should be deprived of the privilege usually attaching to communications because the solicitor happens also to be his co-trustee in the matter on which he consults him. But, in my view, the judgment of North J. does not bear that construction. That is shown by the passage immediately following. He said: "The difficulty of holding that privilege existed in such a case would be very great." Then he gave an example: Suppose that one of the beneficiaries assigns his share in the trust estate, of which notice is given to Rickman, one of the trustees. No notice is given to Tourle, but he has been informed of the assignment by Rickman when acting as Rickman's solicitor. Could he decline to disclose whether he had received notice on the

(1) 35 Ch. D. 726, 727.

ground that he was acting as Rickman's solicitor? The learned judge answered: "In my opinion he could not, but the notice which he had received would have been received by him in his character of trustee, and he would be bound to disclose it." That is to say, the document, assuming there was a document, would not be treated as a confidential communication between a solicitor and his client, but would be treated as one of the papers belonging to the trust estate, and on that ground would have to be disclosed. I think the learned judge is in this part of his judgment dealing with the claim to have the documents produced by virtue of the proprietary right of the plaintiffs, which in that case was undoubted, and not because the claim of privilege was destroyed by the fact that the solicitor consulted was the client's co-trustee.

In my judgment, therefore, so far the claim of professional privilege succeeds, and it applies to the second item in 434, and to the documents comprised in 436 and 437.

It is said, however, that there is a charge of fraud, and that the defendants cannot rely upon professional privilege so as to frustrate perhaps the only way in which that fraud can be proved. The principle is stated by Lord Halsbury in *Bullivant* v. *Attorney-General for Victoria.* (1) On broad principles of law sanctity against production is given to professional communications. But that sanctity must not be made use of so as to prevent proof of a fraud or a crime of which those communications are part and which is charged against the party claiming the privilege. Lord Halsbury said: "If it is sufficient for the party demanding the production to say, as a mere surmise or conjecture, that the thing which he is so endeavouring to inquire into may have been illegal or not, the privilege in all cases disappears at once. The line which the Courts have hitherto taken, and I hope will preserve, is this—that in order to displace the prima facie right of silence by a witness who has been put in the relation of professional confidence with his client, before that confidence can be broken you must have

(1) [1901] A. C. 200, 201.

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some definite charge either by way of allegation or affidavit or what not. I do not at present go into the modes by which that can be made out, but there must be some definite charge of something which displaces the privilege." Then he said that in that case there was no definite charge at all, because what was charged was that the parties had attempted to evade a statute, and, as he pointed out, a person may evade a statute and yet be doing that which is not unlawful.

Is there in the present case any definite charge, or does not the statement of claim show almost to demonstration that the plaintiff has no definite case, that he has no facts within his knowledge on which a definite charge can be made, that he, in fact, makes no definite charge, and that there is nothing more than mere surmise or suggestion? The statement of claim first sets out the testamentary dispositions, the result of which is an absolute gift of the residue to the executors with a declaration that, although the testator hopes and has confidence that they will carry out his wishes, he does not impose upon them any trust such as can be enforced at law. Then paragraph 11 contains three alternative suggestions or charges. [The Lord Justice read the paragraph.] That of itself shows that the pleader had no definite instructions on which he could found a case, and that he was seeking about for some case which could be made. The first two are inconsistent with an allegation contained in an earlier part of the statement of claim as to the effect of the testator's dispositions, because the declaration that the executors were not to be subject to any trust seems to me to be inconsistent with the suggestion that there was a secret trust which the testator desired to impose upon them. The third suggestion, if it stood by itself, would not show any right in the plaintiff to the relief which he claims. Accordingly he seeks to tack on to it another allegation in paragraph 12. [The Lord Justice read the paragraph.] That is intended to suggest either that the testator was a party to the alleged fraudulent device or scheme, or that he was not. In the former case there is obviously no fraud at all, because the testator was entitled, if he desired to do so, to make a

disposition which, if contained in his will, would infringe the Mortmain Act or an Act of a similar nature, by giving the property to persons whom he could trust, without imposing any obligation upon them, to carry his wishes into effect. That is what the testator has done, and there is no fraudulent device in that. It is a perfectly well-known means by which a testator can carry into effect a scheme which he could not carry into effect directly by his will. Nor is there anything in law fraudulent if the persons to whom that gift is made do not carry this intention into effect. It may be morally reprehensible. They are guilty of no fraud, though they may be guilty of betraying the confidence which the testator has reposed in them. If on the other hand the testator was not a party to the fraud, then the proper course is to take proceedings in the Probate Division to set aside the probate on the ground that the will had been obtained by fraud. The plaintiff states in his statement of claim that he is about to do so, and in his reply that he has done so. I refer to these statements to show how vague they are and how clear it is that the plaintiff does not know what his case on the ground of fraud is. The subsequent allegation as to the mode in which the estate was dealt with after the testator's death becomes relevant only if the plaintiff's original case is established.

In my opinion, this is one of those cases in which the line ought to be drawn on the side of protecting the professional privilege rather than on the side of destroying it, there being no distinct allegation or charge of fraud sufficient to prevent the application of the privilege.

This is sufficient to dispose of the appeal. There is, however, a further ground on which production is resisted—namely, that the documents in question relate only to the defendants' case, and do not tend to support the plaintiff's case. As at present advised I think that the learned judge was wrong in rejecting that claim on the ground on which he rejected it—namely, that having looked at the document No. 2 in 434, and thinking that it could not be said that it did not in some way relate to the plaintiff's case, though he did not think it

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would give the plaintiff much comfort, he rejected the statement as to all the other documents, hundreds in number, as to which privilege from production was claimed on the same ground. I do not agree with that view, but it is unnecessary to say more upon it because the claim of professional privilege covers all the documents. The appeal must be allowed.

SCRUTTON L.J. I have arrived at the same conclusion, and in view of the fulness with which my brothers have dealt with the matters involved in the case, I need do no more than shortly state the reasons for which I concur with them. I do so because we are differing from the learned judge below, and because, in my view, the case involves a somewhat important question of practice.

Sir Joseph Whitworth died in 1887, having by his will and codicils left the residue of a large estate to his executors absolutely, having full confidence that they would carry out his wishes, but stating that nothing therein was to be construed to impose any trust upon them. Twenty-eight years afterwards the plaintiff, who is the administrator of a niece of the testator, brought an action against the representatives of the executors, in substance, to reopen the will and to obtain for the next-of-kin the benefit of the residuary estate. Everybody concerned in the matter is dead, and the plaintiff has this further difficulty that Mrs. Uniacke, the niece whom he represents, in 1889 assigned part of her interest to one McGowan, and in December of that year released any claim she had on the estate in consideration of a large sum of money. She received the money and lived for nearly twenty years afterwards, and during those years she took no steps to set aside the release, and after her death the plaintiff, not stating any new facts unknown to her and not offering to return the money, brings this action.

One looks with considerable suspicion at an action of that kind, and the suspicion is not in any way diminished when one sees the way in which the plaintiff's case is stated. It is a pleading obviously framed to take the benefit of anything

that may turn up, without any clear idea of the case which the plaintiff is alleging. The pleader charges either that there was a secret trust which was never defined, or that there was a secret trust which was defined, or that there was no secret trust at all; and whichever it was it was a fraudulent device for appropriating to the use of the executors a large portion of the estate, and it was obtained from a person who was in a feeble state of health both mentally and physically.

The power of the Court to order a litigant to disclose relevant documents is a most valuable one. It is a very stringent power which is given to the Court. It may impose on the party ordered to make disclosure very serious disabilities for which, if the other party is impecunious and loses the action, he will not get satisfactory compensation. Therefore, while it is, in my view, impossible to lay down any fixed rule as to when the Court should, or when it should not, order disclosure, this I think is clear, that the mere fact that there is an allegation of fraud in the pleadings should not of itself render it a matter of course to order disclosure of documents which may be material to the allegation. I hesitate to state in any way the exact amount of evidence which the Court should require, but I think that the Court should be satisfied in cases which involve any extensive disclosure that the plaintiff has some prima facie case, or some substantial reason for thinking that, though he has not in his possession evidence, there is in the possession of the defendant evidence which supports his case, and that in cases where the Court is not satisfied that the plaintiff is in that position it should not order discovery until the plaintiff satisfies the Court that he is in that position.

I am, I think, only saying what Lord Halsbury said in *Bullivant* v. *Attorney-General for Victoria.* (1) That was a case of professional privilege. Lord Halsbury pointed out that, while it might be impossible for a party to prove his case without discovery, on the other hand if a party were allowed to get discovery by merely making guesses, great damage might be caused to the other party, and he declined

(1) [1901] A. C. 196.

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to lay down any fixed rule having in view the varying circumstances of each case. He said, however, that it would be necessary to have some definite charge either in pleadings or by affidavit or by some other method which he did not precisely specify to show that the plaintiff had some real prima facie case. There is a good illustration of that in two cases relating to interrogatories, which is a form of discovery. In *Barham* v. *Lord Huntingfield* (1) the statement of claim alleged the publication of a slander to A., and publication also during three named years to various other persons unknown. The plaintiff interrogated the defendant as to whether during those three years he published the slander to any other persons and to whom. The Court refused to allow the interrogatories. They said that there was nothing to show that this was more than a mere guess. Contrast that with *Russell* v. *Stubbs, Limited.* (2) In that case there was the same sort of allegation, but the plaintiff had an affidavit stating ground for suggesting that there had been a publication to other persons whose names he did not know. On that prima facie evidence the Court allowed the statement of claim to stand with the view of the plaintiff obtaining discovery by interrogatories of the names of the other persons to whom publication had been made. That is merely an illustration of the care which the Court should take in ordering discovery, and that it should not consider it sufficient ground for ordering disclosure that there is an allegation in the pleadings unless the Court is satisfied that the allegation is something more than a mere allegation, or guess, or suspicion. Looking at these pleadings I do not say what may happen at the trial. It may be that the plaintiff's advisers, by evidence which they are at present keeping to themselves, will make a case when the trial comes on. But I cannot on these pleadings see that there is more than a mere guess, an attempt to get discovery on the chance of finding out something which will support a case, either the original case pleaded or a case by amendment, or even possibly, a thing that is not unknown in the history of litigation, an attempt on the part of the

(1) [1913] 2 K. B. 193. (2) [1913] 2 K. B. 200.

plaintiff to make himself so disagreeable to the defendants that they will settle with him by a money payment. I cannot find anything in the pleadings which leads me to believe that there is anything more than that.

A large number of documents have been scheduled in the affidavit of discovery, a large number of books, bills of costs, and diaries covering many years, and professional privilege has been claimed generally, and privilege has also been claimed on the ground that they do not contain any matter supporting the plaintiff's case, but contain matter supporting the defendants' case.

Peterson J. has taken one broad ground. He says that one of these trustees is a solicitor, and there can be no professional privilege between him and his fellow-trustees or executors. He has arrived at that conclusion on the authority of a decision of North J. *In re Postlethwaite.* (1) If North J. did decide that that fact prevented any privilege attaching to documents passing between the solicitor and his co-trustees, which privilege would have attached if the solicitor had not been a trustee, I think his decision would have been wrong. There is a ground on which professional privilege can be defeated. If the solicitor consciously or unconsciously is taking part in the perpetration of a fraud, or if, without knowing it, he is giving advice which is being used in the perpetration of a fraud, public policy overrides the professional privilege. But before professional privilege, which is also a matter of public policy, can be overriden, there must be a satisfactory prima facie case of fraud. A mere suggestion or suspicion of fraud will not be enough, and I am inclined to think that *In re Postlethwaite* (1) is sufficiently explained by the fact that there was taken to be a definite allegation of fraud in which the solicitor was engaged, and therefore no professional privilege could be claimed. In the present case it follows from what I have said about the nature of the charge that there is, in my view, no sufficient allegation of fraud to destroy the professional privilege; and that appears to me to cover all the documents. The learned judge took this further

(1) 35 Ch. D. 722.

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view. Having got rid of the professional privilege by the fact that one trustee is a solicitor, without discussing the question of fraud, he found a claim put forward that these documents only related to the defendants' case and not to the plaintiff's case. He looked at one document as to which he thought that statement was erroneous, and he therefore inferred that it was mistaken as to all the other documents. I have looked at that document, and I cannot from it draw the conclusion that the claim is erroneous as to all the other documents. I cannot see anything in it from which I can draw such a sweeping allegation.

In the result the view I take of the documents is this. As to the first document in 434 the plaintiff has not yet come near to showing that he has any proprietary interest in it. As to all the documents there is professional privilege, not destroyed by the fact that the solicitor is one of the trustees, and not destroyed by any sufficient prima facie case of fraud, and as to all the documents there is a statement in the affidavit that they do not contain anything supporting the plaintiff's case and that they relate solely to the defendants' case, and there are no grounds for going behind the oath. For these reasons I am of opinion that the order of the learned judge should be reversed. The cross-appeal will be dismissed.

Appeal allowed and cross-appeal dismissed.

Solicitors for plaintiff: *Edmond O'Connor & Co.*

Solicitors for defendants: *Pennington & Son, for Tatham, Worthington & Co., Manchester.*

W. F. B.

In re HATCH.
HATCH *v.* HATCH.

SARGANT J.
1919
Feb. 6, 7.

Criticised. *Re* DIPLOCK'S ESTATE. [1948] 2 All E.R. 318

[1916 H. 2054.]

Administration—Alimony—Separation Deed—Covenant by Husband to pay Annuity—Payment without deduction of Income Tax—Recovery of Arrears—Retention out of beneficial Interest in Residue—Income Act, 1842 (5 & 6 *Vict. c.* 35), *ss.* 102, 103—*Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 40.

By indenture made in 1885, after reciting a decree for judicial separation and an order of the Divorce Court directing the husband to pay to the wife permanent alimony after the rate of 200*l.* per annum, the husband covenanted with the wife that he should in substitution for the permanent alimony directed by the order pay to her during her life the sum of 200*l.* per annum subject to a provision that if he should make default in so doing the wife should be at liberty to enforce payment by process under the order as well as by action on the covenant, the intention being that the order should be a collateral and additional security for the covenant thereinbefore contained. The husband died in 1907, having by his will bequeathed his residuary estate to his executors and trustees upon certain trusts in favour of his four sons, one of whom subsequently died, having bequeathed his one-fourth share to the wife absolutely. The husband during his lifetime, and his executors and trustees after his death, had paid the wife's annuity in full without deducting income tax:—

Held, that on the true construction of the deed the wife's annuity was payable subject to, and not free from, income tax.

Held also, that past overpayments in respect of income tax having been made under a mistake of law were not recoverable as a debt from the wife and could not be deducted either from future payments of the annuity or from the wife's share in the residuary estate of the husband.

ADJOURNED SUMMONS.

By an indenture dated March 15, 1885, and made between Andrew Dreweatt Hatch of the one part and Laura Hatch of the other part (after reciting that on December 2, 1882, a decree was made in a cause instituted by the said Laura Hatch against the said A. D. Hatch for their judicial separation and that by an order dated August 4, 1883, it was ordered that the said A. D. Hatch should out of his present income and until further order pay to the said Laura Hatch permanent alimony at the rate of 200*l.* per annum to be payable monthly and a further sum of 65*l.* per annum for

SARGANT J.
1919
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the maintenance of the children of the marriage in the custody of the said Laura Hatch payable quarterly, and that the said A. D. Hatch and Laura Hatch had agreed to the covenants thereinafter contained) the said parties mutually covenanted in manner following (1.) that the said A. D. Hatch should in substitution for the permanent alimony and maintenance directed by the said order pay to the said Laura Hatch during her life the said sum of 200*l.* per annum as her separate estate without power of anticipation to be payable monthly in advance, and should also pay to her the sum of 100*l.* per annum being an increase of 35*l.* per annum for the maintenance of the children of the marriage to be payable quarterly in advance as in the said recited order provided so long a time as the said A. D. Hatch would but for those presents have been liable to pay to the said Laura Hatch the said sum of 65*l.* per annum; (2.) that the said Laura Hatch should not at any time thereafter take any proceedings directly or indirectly to recover any sum other than the said sums of 200*l.* and 100*l.* thereby covenanted to be paid; and (3.) the said Laura Hatch thereby released to the said A. D. Hatch all right to apply for or enforce any further increased or other alimony or maintenance. Provided that if the said A. D. Hatch should make default in payment of any instalment the said Laura Hatch should be at liberty to enforce payment by process under the said order as though default had been in one of the payments directed by the said order as well as by action on the covenant thereinbefore contained, the intention being that the said recited order should be a collateral and additional security to the covenant thereinbefore contained for the payments therein and thereinbefore covenanted to be made, it being the intent and meaning of those presents that nothing therein contained should in any way prejudice the rights or remedies of the said Laura Hatch under the said decree for judicial separation or under the recited order otherwise than in restraint and prevention of her right to make any investigation into the property and affairs of the said A. D. Hatch or for obtaining any further or other allowance from him as thereinbefore provided.

A. D. Hatch died in 1907. By his will dated January 27, 1905, he appointed Clara Shapperley and Frank Howard Hatch executors and trustees thereof, and bequeathed to them his residuary estate upon trusts for sale and conversion, and to divide the same into four equal shares between his four sons (of whom Edgar was one), and directed that one of such shares should be appropriated to each son and settled the share of each son on him and his children.

His son Edgar died in 1915 a bachelor, having by his will appointed his mother Laura Hatch his sole executrix and universal legatee.

In 1916 an originating summons was taken out for the purposes of determining questions on the construction of the will of the testator A. D. Hatch, and by an order made by Sargant J. on June 7, 1916, it was declared (inter alia) that in the events which had happened the one-fourth of the residuary estate directed to be appropriated to the son Edgar belonged to his mother Laura Hatch as the executrix of his will absolutely.

The testator had during his life paid the annuity of 200*l.* under the deed of covenant to Laura Hatch without making any deduction of income tax and after his death the executors and trustees of his will had continued to pay it without deduction of the tax. The question having been recently raised whether the executors and trustees had been acting properly in so doing the present summons was taken out by the executors and trustees in a pending action for the administration of the testator's estate for a declaration that they might be at liberty to deduct any payments already made out of the residuary estate of the testator in respect of income tax on the said annuity from any payments of such annuity subsequently becoming due or from any sum or sums payable or to become payable to Laura Hatch out of the testator's residuary estate.

J. F. W. Galbraith for the summons.

Dighton Pollock for the annuitant Laura Hatch. The payments of income tax made in the past cannot be retained

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by the applicants against the annuitant. In the case of permanent alimony under an order of the Divorce Court it was held in *Frankfort* v. *Frankford* (1) that the wife was entitled to receive it free of income tax on the ground that alimony is calculated on the husband's net income after making all deductions. The same rule is applicable to the annuity covenanted to be paid by this deed, the provisions of which are intended to be concurrent with the order for alimony by way of security for its payment and of addition thereto. The present case is different from *In re Barry's Trusts* (2), *Warren* v. *Warren* (3), *Shrewsbury* v. *Shrewsbury* (4), *Blount* v. *Blount* (5), *In re Shaw* (6), which were cases of covenants in deeds for payment of maintenance and subject to the provisions of the Income Tax, 1842, ss. 102, 103, and the Income Tax, 1853, s. 40, without regard to the practice of the Divorce Court as to payment of alimony. [He also cited *Chadwick* v. *Pearl Life Insurance Co.* (7)]

Stafford Crossman for persons interested in the residuary estate of the testator. It is clear that by the terms of the deed the annuity substituted for the wife's alimony was subject to deduction of income tax: *In re Barry's Trusts.* (2) On the other hand I admit that overpayments in respect of income tax having been made to her by mistake of law are not recoverable as a debt and cannot be deducted from future payments of the annuity under the deed: *Currie* v. *Goold* (8); *Warren* v. *Warren* (3); *Shrewsbury* v. *Shrewsbury* (4); but so far as the annuitant's beneficial interest in the testator's estate is concerned the case is different, and falls within the principle of *In re Akerman* (9), according to which the applicants are entitled to treat the overpayments as money paid to her on account of her share in the residuary estate. That would clearly be so if the annuity had been created by the will of the testator: *In re Musgrave* (1); *In re Ainsworth* (2); and

(1) (1845) 4 Notes of Cases, 280.
(2) [1906] 1 Ch. 768; [1906] 2 Ch. 358.
(3) (1895) 72 L. T. 628; 43 W. R. 490.
(4) (1906) 22 Times L. R. 598.
(5) [1916] 1 K. B. 230.
(6) [1918] P. 47.
(7) [1905] 2 K. B. 507.
(8) (1817) 2 Madd. 163.
(9) [1891] 3 Ch. 212.

see *In re Robinson* (3); and the principle of *In re Akerman* (4) is sufficiently wide to embrace the present case, in which the annuity was payable under the deed of covenant executed by the testator in his lifetime. The equity arises out of the circumstances existing at the date of the testator's death, and the applicants are entitled to recoup to the estate the amount of the overpayments—though made under a mistake of law, and not constituting a legal debt—out of the share to which the annuitant became beneficially entitled.

E. F. Spence for other persons in the same interest.

SARGANT J. stated the facts and continued: Three questions have been raised on the present summons, first, whether on the construction of the deed of separation income tax ought to have been deducted before any payment of the annuity to the wife; secondly, if it ought to have been so deducted, then whether the amount overpaid in the past can be deducted from future payments of the annuity; and thirdly, if not, then whether the amount overpaid can be retained by the applicants out of a share of the testator's residuary estate to which the annuitant became beneficially entitled under the will of one of her children. The first question is in my opinion concluded by *In re Barry's Trusts* (5); and even assuming, which to my mind is by no means clear, that under the order of the Divorce Court the alimony was payable to the annuitant free of income tax, it does not at all follow that the annuity which was substituted for alimony by the deed of covenant was equally free from income tax. After the husband's death the annuity was not alimony at all and was payable solely under the terms of the deed. This created a direct contract on the part of the husband to pay the annuity to the annuitant during her life, which in my opinion falls directly within the provisions of the Income Tax Acts.

The second question is whether the tax which was not

(1) [1916] 2 Ch. 417.
(2) [1915] 2 Ch. 96.
(3) [1911] 1 Ch. 502.
(4) [1891] 3 Ch. 212.
(5) [1906] 1 Ch. 768; [1906] 2 Ch. 358.

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in fact, but which ought to have been, deducted in respect of the past payments of the annuity can now be made good to the residuary estate of the testator out of future payments of the annuity. It has been admitted and in my opinion rightly admitted by Mr. Crossman that this point is concluded by *Warren* v. *Warren* (1), and that the overpayments having been made under a mistake of law there is no debt recoverable from the annuitant which would entitle the applicants to deduct the amount overpaid from the future payments of the annuity under the covenant contained in the deed. It has however been contended, and this is the third point to be determined, that, although that may be the case with regard to the question of retention out of future payments of the annuity, the applicants are nevertheless entitled to retain the amount of such overpayments out of the share of the residuary estate of the testator to which the annuitant became beneficially entitled under the will of her son Edgar. It is said that the annuitant having received out of the residuary estate of the testator a larger payment than she was entitled to as a creditor, is not entitled to receive any further part of that estate until that estate has been recouped the amount of such overpayments out of the share to which the annuitant has become beneficially entitled.

That would no doubt be so if the overpayments had been made under a mistake of fact, since in that case the estate would be a creditor of the annuitant; but here the estate is not a creditor of the annuitant because the mistake is one of law, and what is sought is to set off against the beneficial interest of the annuitant in the estate something short of a debt—something which never was a debt owing by her, and cannot therefore be made available for the purpose of reducing the amount payable to her in respect of her beneficial interest. Assume for a moment that by a mistake of law the annuitant as a creditor had been paid too little so that the residuary legatees had received too much, would it be open to the annuitant to stop the distribution of the estate until the sums by which the residuary legatees had been overpaid had been

(1) 72 L. T. 628; 43 W. R. 490.

deducted? To ask that question is in my opinion to answer it. The fact is that the payment having been made under a mistake of law the parties are left as they are without any resultant rights. I am of opinion therefore that in respect of these past payments to the annuitant which comprised the amount of the tax there is no right in the applicants to retain such overpayments either out of future payments of the annuity under the deed or out of the share of the annuitant in the residuary estate of the testator.

Solicitors for applicants: *Smiles & Co.*

Solicitors for respondents: *Bennett & Ferris; Reid Sharman, White & Brutton.*

A. C.

METROPOLITAN ELECTRIC SUPPLY COMPANY *v.* LONDON COUNTY COUNCIL.

[1918 M. 1062.]

War—Emergency Legislation—"Serious hardship" in enforcement of Contract—Relief by Court—Courts (Emergency Powers) Act, 1917 (7 & 8 *Geo.* 5, *c.* 25), *s.* 1, *sub-s.* 2.

Two distinct powers to give relief against the enforcement of contracts on the ground of serious hardship are given to the Court by s. 1, sub-s. 2, of the Courts (Emergency Powers) Act, 1917—namely, (1.) to suspend or annul a contract, and (2.) to stay proceedings in respect of a contract, or any term thereof, or any right arising thereunder; and power (1.) is given only as to the whole of the contract, while power (2.) is given as to the whole of the contract, or any term thereof, or any rights arising thereunder.

Dicta in *Boyce* v. *Hill* [1918] 2 K. B. 616, 620 not followed.

Electrical Pavilions (Marble Arch), Ld. v. *Lorden* [1918] 2 Ch. 399 distinguished.

IN this case an originating summons was taken out by the plaintiff company (below called "the plaintiffs") against the defendant council for relief under s. 1, sub-s. 2, of the Courts (Emergency Powers) Act, 1917. The summons asked

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that a building agreement between the parties, dated December 31, 1912, relating to a site fronting on the west side of Kingsway, London, "may be suspended, or any proceedings for the enforcement thereof stayed, or that the right of the London County Council to receive the full rent reserved thereunder may be suspended, upon such terms as the Court may think fit, on the ground that, owing to the prevention and restriction in the supply and delivery of materials, and the regulations and orders made under the Defence of the Realm Act, the agreement cannot be enforced without serious hardship to the applicants."

The following statement of facts is taken from the judgment of Sargant J.

The site in question (below referred to as "the blue site") was let to the plaintiffs for the purpose of their developing it as a single building site in connection with a much larger area of back land, almost precisely five times the size (below referred to as "the pink site"), and with this object two very special terms were arranged between the parties. In the first place, the time limited by the building agreement for the submission of plans to the defendants and for the construction of the buildings were very much longer than would otherwise be the case, the first period being fixed at three years instead of three months, and the second at four years instead of eighteen months. In the next place, it was made a condition by the plaintiffs that the benefit of the building agreement might be transferred to a lessor or purchaser of the pink site, and that they should not be bound to build on the blue site until they had covered the pink site. By virtue of the arrangements made between them and the defendants the plaintiffs were in fact able to let the pink site (together with the blue site) on building agreement to the General Electric Supply Co., Ld. (below called "the General Company"), on much more favourable terms than would otherwise have been obtained. The excess rent thus obtained for the pink site was estimated by the valuer of the defendants as 832*l.*, being only 6*l.* less than the rent payable by the plaintiffs to the defendants, and it was in evidence, which

was not contradicted or questioned by the plaintiffs, that, if the blue site had not been disposed of to the plaintiffs, it could have been leased to other persons at a rental of 4*s.* per square foot (this being the rent agreed with the plaintiffs) and covered with buildings before July, 1916; and the sites immediately to the north and immediately to the south of the blue site were so covered before that date. In July, 1915, the difficulties in building became so great that application for an extension of time was made by the General Company to the plaintiffs, and to the defendants in their turn by the plaintiffs. On this second application the defendants, while not actually granting any extension of time, intimated that they were not likely to take any hostile action under the building agreement if the rent was paid. Matters remained on this footing until the order of the Minister of Munitions of July 14, 1916, prohibiting building at a cost of over 500*l.*, and so continued down to the commencement of the present proceedings, except that the rent of 838*l.* payable on June 24, 1918, had not then been paid. Afterwards a sum of 429*l.* 2*s.* 10*d.* (being the rent to which the plaintiffs claimed that the rent of 838*l.* should be reduced) was paid to, and accepted by, the defendants without prejudice to their rights. The question of fact in the case was whether, under these circumstances, it was a serious hardship for the plaintiffs to have to go on paying the full rent of 838*l.* in respect of the blue site, having regard to the fact that they had reduced the rent payable by the General Company to them from 4283*l.* to 2500*l.*, and that this reduction was not questioned by the defendants as a reasonable one, having regard to all the circumstances, as between the plaintiffs and the General Company.

A. Grant K.C. and *Rayner Goddard* for the plaintiffs. The relief which the plaintiffs are really seeking is that there should be a suspension of the rent, a temporary reduction of it, to such an extent and for such a time as is reasonable under the circumstances of the case. Merely postponing the enforcement of the rent or part of it will not materially assist

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the plaintiffs. The circumstances show a case of "serious hardship" on the plaintiffs within the meaning of s. 1, sub-s. 2, of the Courts (Emergency Powers) Act, 1917.

If such a case is made out, the Court has jurisdiction to assist the plaintiffs by relieving them from the obligation to pay all or a part of the rent reserved by the building agreement. The words of the sub-section point to the Courts having jurisdiction to give relief in respect of a term of the contract without the relief extending to the whole of the contract. This contention accords with the opinion of Lush J. in *Boyce* v. *Hill* (1) and the decision of Astbury J. in *Electric Pavilions* (*Marble Arch*), *Ld.* v. *Lorden.* (2)

Rolt K.C. and *T. H. Attwater* for the defendants. On the facts it is submitted that, whatever inconveniences have been suffered by others, no "serious hardship" has befallen the plaintiffs.

The Act is plainly expressed, and shows that the Court has power to stay proceedings for the recovery of rent, but cannot suspend or cancel part only of the agreement under which the rent is payable.

The observations of Lush J., in *Boyce* v. *Hill* (1), so far as they touch the present case, are mere obiter dicta, and the judgment of Astbury J. in *Electric Pavilions* (*Marble Arch*), *Ld.* v. *Lorden* (2), does not apply.

Cur. adv. vult.

Feb. 12. SARGANT J. This is an application for relief under s. 1, sub-s. 2, of the Courts (Emergency Powers) Act, 1917. The application is in respect of a building agreement dated December 31, 1912, in relation to a site fronting on the west side of Kingsway, and the relief asked is in very general terms.

[His Lordship stated the relief asked for, and continued:] But at the Bar it was admitted on behalf of the plaintiffs that a mere postponement of the right to enforce the rent due under the agreement, or any part thereof, was of no real value to the plaintiffs, and the claim formulated on behalf

(1) [1918] 2 K. B. 616, 620. (2) [1918] 2 Ch. 399.

of the plaintiffs was that there should be a suspension (in the sense of a temporary reduction) of the rent payable under the agreement; or, in other words, an annulment of rent for such period and to such extent as should be proper under the circumstances.

The defence of the London County Council is twofold. They say, first, that there is here no case of serious hardship, such as is a necessary preliminary to the grant of any relief under the Act. They say, secondly, that the Act gives no power to suspend or cancel part only of the terms of a contract, such as, in this case, the agreement to pay rent, though they admit that the Act gives express power to stay proceedings for a time in respect of the recovery of rent under the agreement. The first defence is one depending on the particular facts of this case, and of no general interest. The second defence involves the construction of the statute in a vital point, and is of the highest general importance. As regards the first defence, the facts appear very clearly from the commendably short and relevant affidavits that have been filed, and I need not recapitulate them at length. I will only call attention to those features which specially affect the question of serious hardship.

[His Lordship stated the facts above set out, and continued:] Under these circumstances, is it a serious hardship for the plaintiffs to have to go on paying the full rent of 838*l.* in respect of the blue site, having regard, of course, to the fact that they have reduced the rent payable by the General Company to them from 4283*l.* to 2500*l.*, and that this reduction is not questioned by the defendants as a reasonable one, having regard to all the circumstances, as between the plaintiffs and the General Company? In my opinion, the question must be answered in the negative. The position of the defendants in relation to the plaintiffs seems to me entirely different from that of the plaintiffs to the General Company. In the latter case the General Company were not only paying a large rent for a property for which they could get no immediate return at all, but they were also standing out of any return on a very large

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capital expenditure. And further, the General Company's loss arose exclusively out of the contract between them and the plaintiffs. In the former case the plaintiffs have escaped from all unproductive capital expenditure, and further, are getting, even after the reduction, a rent but a very few pounds short of the total of the rent payable for the blue site and of the rent which they would have got for the pink site had they let it apart from the blue site. Further, the long delay that originally took place in building on the blue site had little or nothing to do with the relations of the plaintiffs and the defendants in respect of that site. It arose from the position of the plaintiffs as the freeholders of the much larger pink site, and their natural desire to develop that site in conjunction with the blue site, and so as to obtain, through the blue site, a main frontage value for the whole of the pink site. The blue site was, in fact, treated as an adjunct to the pink site, and used mainly for the purpose of obtaining the utmost value for the pink site. And it appears to me that any loss of the plaintiffs in the transaction—or, rather, perhaps, any failure of theirs to obtain a full profit—has been the consequence, not of the relations of the plaintiffs and the defendants in respect of the blue site, but of the arrangements made by the plaintiffs, as the freeholders of the pink site, for the profitable development of that site. In fact, the plaintiffs have suffered as the landlords of the General Company under that contract rather than as tenants of the defendants under this contract. I should add that I am by no means convinced that any considerable delay has been caused in the execution of the building scheme on the pink and blue sites by the order of July 14, 1916, prohibiting building work to a value of over 500*l*. The correspondence between the parties indicates that before that time the building scheme had practically been stopped by current difficulties in the way of obtaining materials and labour. It matters little that further building was rendered unlawful in July, 1916, if it had previously become impracticable. For all these reasons I have come to the conclusion that the plaintiffs have not given sufficient proof

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of serious hardship to bring themselves within the section of the Courts (Emergency Powers) Act, 1917.

I have now to deal with the second defence—namely, that founded on the construction of s. 1, sub-s. 2, of the Act of Parliament. Here, of course, I have to consider in the first place what is the grammatical meaning of the words used according to the ordinary meaning of the English language; and, if that meaning is clear in itself, I have no right to depart from it unless it involves such an absurdity or is so meaningless that some other construction has to be given to the words used. Now, on the plain grammar of the words used (and it is to be remembered that precisely the same words are used in both sub-s. 1 and sub-s. 2, so that the language is quite deliberately chosen), there are two distinct powers given to the Court—namely, first, a power to suspend or amend a contract; and, secondly, a power to stay proceedings in respect of a contract or any term thereof or any rights arising thereunder. It seems to me impossible, as a mere question of grammar, to carry on the force of the verbs "suspend or annul" over the numerous intervening words so as to apply these two verbs to the phrase "any term thereof or any rights arising thereunder." And the result is that, on the face of the words used, the power of annulment or suspension is given only as to the whole of a contract, while the power of staying proceedings is given either as to the whole of a contract or as to any term thereof or any rights thereunder.

Is there, then, any sufficient reason, either from the nature of the subject-matter or from any context in the statute, for giving a different interpretation to the words used, and holding that the words "suspend or annul" apply to, and have as their object, not merely the substantive "the contract," but also the substantive phrase "any term thereof or any rights arising thereunder." I do not think so. The scheme of the section, which accords with its grammatical construction, seems to me quite intelligible, if rather narrow. Contracts within the sub-section may be annulled either permanently or temporarily, for it was agreed on both sides that suspension meant an annulment, out and out or finally,

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of rights and obligations accruing during the period of suspension. Or the lesser remedy may be applied of a postponement of the enforcement of the contract, or any term thereof, or any rights arising thereunder. In this latter case, inasmuch as rights are not permanently affected but only rendered unenforceable for a time, there is no great danger in allowing part only of the terms of the contract, or the rights thereunder, to be dealt with, since the rights ultimately enforceable will be all the various compensating rights under the agreement. In the former case, a final cancellation, whether temporary or permanent, of some only of the terms of a contract, or of the rights thereunder, might amount to an almost complete variation of the contract; and it might well be considered that a power to vary contracts almost indefinitely (or in other words to make new contracts between contracting parties) was one of too sweeping and indefinite a character to thrust upon the Court. In the case of an ordinary contract of tenancy, for example, while it might be advisable to allow the Court to annul the tenancy altogether, or for a certain period, or to allow the Court to stay for a time proceedings for enforcement of rent, it would be going very much further to give the Court power entirely to alter the nature of the contract by annulling the rent or suspending it for a time, while still allowing the tenant to have the benefit of the right of occupation. A change of this kind would be a variation of the contract in such an essential respect as to amount to a completely new contract; and I do not find in the section anything to point to an intention to give the Court any such power of general variation of contracts. Indeed, the section rather seems to point to an intention to produce suitable variations of contracts in an altogether different way—namely, by holding out the threat of the simpler process of suspension or annulment should an offer of a reasonable variation be declined.

It was argued for the plaintiffs that the circumstance of the powers of the Court arising because of serious hardship from the enforcement of any term of the contract suggested that the whole relief contemplated by the section was relief

in respect of a term of the contract—namely, the term involving hardship—and not necessarily in respect of the whole contract. But it is to be noted that the "any term" in respect of which relief is to be given is in no way identified with the "any term" whose enforcement would involve serious hardship. And where the grammatical meaning of a statute is clear, and where that grammatical meaning produces a quite intelligible result, as I think is the case here (for the fact that any term of the contract produces serious hardship may be a proper reason for relief whatever one's view of the later words), the Court is not at liberty to depart from the proper grammatical meaning merely because it considers that some other interpretation might be more generally advantageous or more consistent with the antecedent probabilities of the case.

It has, however, been strongly pressed on me by the plaintiffs that I am bound by an expression of opinion by Lush J. in *Boyce* v. *Hill* (1) and by a decision of Astbury J. in *Electric Pavilions* (*Marble Arch*), *Ld.* v. *Lourden.* (2) In the first of these cases the view of the learned judge was, and was expressed to be, a mere obiter dictum, and was entirely unconnected with the decision at which he ultimately arrived. As regards the second case, the actual decision does rather suggest that the learned judge was favourably inclined to some part at least of the argument for the defendant that the section—I am quoting from the argument for the defendant as stated in the Law Reports—"impliedly authorizes the Court to vary, alter, modify, or adjust the terms of the contract and the rights and obligations of the parties." But he never in terms adopts this very sweeping interpretation of the language of the statute, and he may perhaps have taken the view that, as between the two adjoining lessees from the same lessor who were the parties to the litigation, the only contract which subsisted and had to be dealt with was the contract to indemnify as regarded 2100*l.* per annum. In the present case this is not so. That part of the contract under which the plaintiffs have, as against the defendants,

(1) [1918] 2 K. B. 616, 620. (2) [1918] 2 Ch. 399, 402.

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the right to possession of the blue site, carrying with it the right to receive rent from the General Company in respect of that site, is as much subsisting as the correlative part of the contract under which the plaintiffs have to pay rent to the defendants.

In my judgment, both the grounds of defence which I have considered are sound, and I dismiss the application with costs.

Solicitors for the plaintiffs : *Wilkinson, Raikes & Son.*
Solicitor for the defendants : *D. P. Andrews.*

F. E.

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In re JARRETT.
In re VRENEGROOR.
BIRD *v.* GREEN.

[1918 J. 1065.]

General Power of Appointment—Exercise by Will—Subsequent Revocation by Codicil—Residuary Bequest—Contrary Intention—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 27.

A fund of 10,000*l.* was settled by the will of J. in trust to pay the income to G. during her life, and after her death upon such trusts as G. should by will or codicil appoint, and in default of appointment in trust for her statutory next of kin as therein mentioned. G. by her will recited the power of appointment conferred on her by the will of J. and in express exercise thereof appointed the fund in favour of her husband absolutely, and bequeathed her residuary estate upon trust for certain other persons therein named. By a codicil to her will she revoked her former bequests to her husband and died in his lifetime:—

Held, that the residuary bequest operated as an execution of the general testamentary power, and that the fund in question passed to the residuary legatees.

The failure of an appointment made under a general testamentary power occasioned by a subsequent revocation does not amount to a "contrary intention" within the meaning of s. 27 of the Wills Act so as to exclude the operation of that section.

ADJOURNED SUMMONS.

W. J. Jarrett, who died on January 19, 1906, by his will

dated July 26, 1904, devised and bequeathed his residuary personal estate and all his real estate to trustees upon trust to sell and convert the same into money and out of the moneys to come to their hands to set apart and invest the sum of 10,000*l.* in the names of his trustees upon trust to pay the annual income thereof unto Jessie Marian Green during her life, and directed that after her death the said sum of 10,000*l.* should be held upon such trusts as she whether married or sole should by will or codicil appoint and in default of such appointment or so far as any such appointment if incomplete should not extend in trust for the person or persons who under or by virtue of the statutes for the distribution of the estates of intestates would at the decease of the said Jessie Marian Green be entitled to her personal estate in case she were to die intestate domiciled in England a widow and to be divided between such persons (if more than one) in the shares and proportions in which the same would become divisible by virtue of the same statutes.

Jessie Marian Green subsequently intermarried with Josephus Ludovicus Vrenegroor, and by her will dated January 26, 1916, appointed William Avery Bird and William Oliver Lovibond her executors and trustees, and after reciting the directions in the will of the said W. J. Jarrett as to the said sum of 10,000*l.*, and stating that she had out of her own moneys contributed the sum of 331*l.* 4*s.* which was added to the said sum of 10,000*l.* to enable the trustees of his will to take over certain securities for the total principal sum of 10,331*l.* 4*s.* continued as follows: "Now in exercise of the said recited power and of every other power in this behalf me enabling I appoint and declare that the trustees or trustee for the time being of the will of the said W. J. Jarratt deceased shall upon my decease hold the said sum of 10,331*l.* 4*s.* and the stocks funds and securities in or upon which the same may then be invested upon trust to convey assign and transfer the same forthwith to my said husband Josephus Ludovicus Vrenegroor for his own use and benefit absolutely." And as to the residue of her real estate and all the residue of her personal estate and effects whatsoever and wheresoever not thereby otherwise

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disposed of she devised and bequeathed the same unto and to use of her trustees upon trust to sell and convert the same into money and out of the moneys to arise therefrom to pay her funeral expenses, debts and legacies and to hold the residue upon trust to divide the same into four equal parts upon trusts in favour of four persons therein named.

On November 16, 1916, Jessie Marian Vrenegroor made a codicil to her will as follows: "I Jessie Marian Vrenegroor revoke my former bequests to my husband and I give devise and bequeath to my husband the sum of 2*l.* a week so long as he shall reside in this country the said sum to be paid to him weekly."

The testatrix died on December 19, 1916. At the date of her death her father William Llewellyn Green would have been her sole next of kin if she had died a widow. Josephus Ludovicus Vrenegroor disputed the validity of the codicil, and an action was commenced in the Probate Division in which terms of settlement were made between all parties interested under which, subject to the residuary bequest contained in the testatrix's will passing the fund of 10,000*l.* over which she had power of appointment under the will of W. J. Jarrett, it was agreed that out of such fund a sum of 1000*l.* should be paid to the said Josephus Ludovicus Vrenegroor in addition to the said annuity of 2*l.* given to him by the codicil, and by an order dated July 1, 1918, Horringe J. pronounced for the force and the validity of the will and codicil.

This was an originating summons taken out by the trustees of the will of the testatrix against William Llewellyn Green, Josephus Ludovicus Vrenegroor, and the persons representing the shares of residuary estate under her will for the determination of the question whether her will and codicil passed, with her residuary estate, the investments representing the sum of 10,000*l.* over which she had a testamentary power of appointment under the will of W. J. Jarrett.

Edward Beaumont for the summons.

P. F. S. Stokes for William Llewellyn Green. The residuary

gift in the testatrix's will does not carry the fund in question, but the gift over in default of appointment under the will of W. J. Jarrett takes effect. I admit that if the fund were ineffectually appointed by virtue of the death of the appointee in the lifetime of the testatrix, it must fall into residue: Hawkins on Wills, 2nd ed., pp. 52, 53; *In re Spooner's Trust* (1); *Bernard* v. *Minshull* (2); but there is no reported case where the principle of those cases has been extended to a case like the present where the appointment has been revoked. I also admit that if the fund had been the testatrix's own property it would have been comprised in the residuary gift, but this is because a residuary gift is supposed prima facie to carry the whole of the testatrix's own property subject to what may be effectually excepted thereout. Here the case is different, the fund is vested in the appointor's next of kin subject to its being effectually divested from them. Taking the testatrix's will as the material document to be regarded there is a sufficient "contrary intention" within the meaning of s. 27 of the Wills Act. The intention shown is that the husband, and not the residuary legatees, shall take the fund, and the failure of the appointment occasioned by the revocation contained in the codicil is not the same thing as if it had been caused by lapse as in *In re Spooner's Trust.* (1) The will of the testatrix shows a "contrary intention" and the codicil cannot be read into the will for the purpose of negativing that contrary intention: *In re Clark's Estate.* (3)

[He also referred to *In re Guyton & Rosenberg's Contract* (4) and Theobald on Wills, 7th ed., p. 232, as to a "contrary intention" within the meaning of s. 26 of the Wills Act.]

A. Grant K.C. and *P. B. Lambert* (for *J. Beaumont*) for some of the residuary legatees under the testatrix's will. The appointment in the husband's favour having been revoked by the codicil the fund passed under the residuary gift which operated as an execution of the power under s. 27 of the Wills Act. An attempted disposition which fails whether by lapse

(1) (1851) 2 Sim. (N. S.) 129.
(2) (1859) John. 276.
(3) (1880) 14 Ch. D. 422.
(4) [1901] 2 Ch. 591.

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or revocation does not amount to a "contrary intention" within the meaning of s. 27, and the present case falls within the principles stated in *In re Spooner's Trust* (1); *Bernard* v. *Minshull* (2); *In re Elen.* (3)

A. E. Woodgate for other residuary legatees.

G. M. T. Hildyard for Josephus Ludovicus Vrenegroor.

F. E. Farrer for trustees of W. J. Jarrett's will.

SARGANT J. With all due respect to the argument which has been addressed to me by Mr. Stokes I confess that I feel no doubt about the present case. [His lordship referred to the facts and continued:] The question is whether the gift of residue contained in the will of the testatrix carries with it the sum of 10,000*l.* Prima facie the residuary bequest is effectual to dispose of the property subject to the testatrix's general power of appointment together with her own property under s. 27 of the Wills Act "unless a contrary intention shall appear by the will," and it is clear that the onus lies on those who assert that the property subject to the general power does not pass under the residuary bequest to prove the contrary intention. It is admitted by Mr. Stokes that if the husband had predeceased the testatrix the fund would have fallen into residue and have passed under the residuary bequest contained in her will. It is also admitted by Mr. Stokes that if the fund had belonged to the testatrix in the ordinary way then, notwithstanding the fact that the gift failed by revocation and not by lapse, the same result would have followed. That last admission seems to me to be fatal to Mr. Stokes' case, for if that be the result where the property is the absolute property of the testatrix I can see no sufficient ground for drawing any distinction between failure by lapse and failure by revocation in the case of property which is subject to a general power. In my judgment the failure of an express appointment of property subject to a general power shows no intention on the part of the appointor to prevent a gift of residue from operating on the property subject to the power

(1) 2 Sim. (N. S.) 129. (2) John. 276.
(3) (1893) 68 L. T. 816.

for whatever reason the failure takes place, whether by the death of the appointee in the testatrix's lifetime or by revocation of the appointment by a subsequent testamentary disposition. To introduce any such distinction would in my judgment be to nibble at the general principle laid down in s. 27 of the Wills Act, the intention of which was to assimilate the testamentary rules as to general powers of appointment to those which govern the disposition of a testator's own property. I decide therefore that the will and codicil in the present case had the effect of passing the fund in question and that it goes to the residuary legatees named in the testatrix's will.

Solicitors : *Church, Rendell, Bird & Co., for Bird & Lovibond, Uxbridge ; Percy Robinson & Co. ; Woodbridge & Sons; J. S. Phillips & Son; Farrer & Co.*

A. C.

In re ALEXANDER.

ALEXANDER *v.* ALEXANDER.

SARGANT J. 1918 *Nov.* 21, 26.

[1918 A. 235.]

Will—Construction—Gifts to nephews and nieces and their issue "as tenants in equal shares per stirpes"—Stage of commencement of stirpital division.

Testator gave a fund upon trust to pay the income to named sisters or the survivors or survivor for their or her lives or life. After the death of the last survivor the fund was to be held : "In trust for such of my nephews and nieces (being children of my own brothers and sisters) living at the death of the survivor" of the named sisters "and for the issue then living of any such nephews and nieces of mine who may have previously died as, being male, shall have attained or shall attain the age of twenty-one years, or, being female, shall have attained or shall attain that age, or shall have married or shall marry under that age, and if more than one as tenants in equal shares per stirpes." S. was the last survivor of the named sisters (all of whom were spinsters), and he had four brothers, G., F., X. and H., and nineteen nephews and nieces (children of the brothers). Fourteen of these survived S. and five predeceased her. The predeceasing children of the brothers left children who also survived S., and one of these predeceasing children left a child.

It was conceded (1.) that "issue" was not confined to children,

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but included issue of all degrees; (2.) that, as between issue of different degrees in the same line of descent, issue of a more remote degree were excluded by issue of a less remote degree; and (3.) that issue took as tenants in common:—

Held, that the stirpital division directed by the will took effect so that the trust fund became divisible into a number of parts—namely, nineteen—equal to the number of nephews and nieces who survived the death of S., either by themselves or by their stocks.

Observations on the conflict of authority in *Robinson* v. *Shepherd* (1863) 4 D. J. & S. 129; *Gibson* v. *Fisher* (1867) L. R. 5 Eq. 51; *In re Wilson* (1883) 24 Ch. D. 664; and *In re Dering* (1911) 105 L. T. 404.

WILLIAM D. ALEXANDER, by his will, dated March 21, 1881, after appointing executors and trustees, and specifically devising a freehold estate, and giving certain specific and pecuniary bequests, bequeathed to the trustees a sum of 20,000*l.*, upon trust to invest the same and pay the income to testator's sisters, Mary Barber Alexander, Elizabeth Alexander, and Sarah Ann Alexander, during their joint lives, and to the survivors or survivor of them during the lives of such survivor. And from and after the death of the survivor the trust fund was to be held as follows, that is to say: "In trust for such of my nephews and nieces (being children of my own brothers and sisters) living at the time of the death of the survivor of them, the said Mary Barber Alexander, Elizabeth Alexander and Sarah Ann Alexander, and for the issue then living of any such nephews and nieces of mine who may have previously died as, being male, shall have attained or shall attain the age of twenty-one years, or, being female, shall have attained or shall attain that age, or shall have married or shall marry under that age, and, if more than one, as tenants in equal shares per stirpes." The ultimate residue was given upon trusts under which testator's niece, Mary Ann Alexander, became entitled to one-third thereof, and the will provided that if she should die in the testator's lifetime, leaving issue in existence at his death, the issue in existence at his death, and who, being male, should attain the age of twenty-one years, or, being female, should attain that age or marry, of Mary Ann Alexander, should take by substitution as tenants in common, in equal shares per stirpes if more than one (and so that no issue

remoter than a child should take except in case of the death in the testator's lifetime of his, her or their own parent, and in the place of such parent) the share in the residuary estate which Mary Ann Alexander would have taken under the trust in that behalf thereinbefore declared had she survived the testator. The will also provided that it should be lawful for the trustees to raise any parts or part, not exceeding in the whole one-half of the expectant or presumptive or vested share or portion of any person under the trusts or dispositions of the will, and to apply the same for the advancement or benefit of such person in such manner as the trustees should think fit.

Testator died on April 15, 1887. His three sisters survived him, but none of them was ever married, and the survivor of them, Sarah Ann Alexander, died on January 14, 1918.

The testator had four brothers, George William, Frederick, Samuel and Henry, and nineteen nephews and nieces who were the children of these brothers. Fourteen of the nephews and nieces survived Sarah Ann, and five predeceased her leaving issue at her death. George had three children, of whom one only survived Sarah Ann Alexander. Another of George William's children, Robert Henry, predeceased Sarah Ann, leaving eight children who survived her. William Cleverly, the other child of George, predeceased Sarah Ann leaving seven children who survived her.

Frederick, another brother, had seven children, six of whom survived Sarah Ann, and the other, John William, predeceased her leaving three children who survived her.

Samuel, another brother, had three children, all of whom survived Sarah Ann.

Henry, the remaining brother of the testator, had six children, four of whom survived Sarah Ann. One of Henry's children, William, predeceased her, leaving three children who survived her. Alfred, the other child of Henry, predeceased Sarah Ann, leaving two children who survived her.

The trustees of the will took out an originating summons, to which the following persons were defendants—namely, Edward Alexander (a child of the testator's brother Samuel),

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Katherine Sarah Allen Shuter (one of the children of testator's nephew, Robert Henry), Leonard W. Allen Shuter (a child of Katherine Sarah Allen Shuter, and therefore of a class of issue more remote than children of testator's deceased nephews), and Theodore Alexander (one of the children of testator's deceased nephew William Alexander).

On the first three questions raised by the summons his Lordship decided (1.) that the word "issue" was not confined to children, but included issue of all degrees; (2.) that, as between issue of different degrees in the same line of descent, issue of a more remote degree were excluded by issue of a less remote degree; and (3.) that issue took as tenants in common and not as joint tenants.

The remaining question was of what stage the stirpital division directed by the will was to begin—that is to say, whether it was to take effect in relation to the stocks of descent of the earliest class of takers, the nephews and nieces, so that they shared not per capita but per stirpes, or whether the division was to take effect only in relation to stocks of descent as from the nephews and nieces themselves so that those persons themselves were to share per capita, in which case the first process of division would be into nineteenths corresponding with the number of the testator's nephews and nieces who survived either in person or by their stocks.

G. H. Devonshire for the plaintiffs stated the facts and the questions involved.

Wilfrid Hunt for the defendant Edward Alexander. The brothers of the testator must be taken as the stocks. The fund being divisible into four equal parts, Edward Alexander is entitled to a twelfth part of the fund: *Gibson* v. *Fisher*. (1) [He also referred to *Robinson* v. *Shepherd* (2); *In re Wilson* (3); and *In re Dering*. (4)]

J. H. Stamp for Katherine S. A. Shuter. The fund is divisible into four parts. The words "as tenants in equal shares per stirpes" only show that there is to be equality between the different families, as in *Robinson* v. *Shepherd* (2),

(1) L. R. 5 Eq. 51.
(2) 4 D. J. & S. 129.
(3) 24 Ch. D. 664.
(4) 105 L. T. 404.

and between the individual members of each family. The form is one in common use. See Key & Elphinstone's Conveyancing Precedents, 10th ed., vol. 2, pp. 903, 904, Form 3.

C. P. Sanger for Theodore Alexander. The fund is divisible into nineteenths, the nephews and nieces, either personally or by their stocks, being taken as the stocks. Effect will not be given to the words " in equal shares " if the testator's brothers are taken as the stocks.

Cur. adv. vult.

Nov. 26, 1918. SARGANT J. By the will of the testator a sum of 20,000*l.* was given to trustees, upon trust to invest, and to pay the income to the testator's sisters, Mary Barber Alexander, Elizabeth Alexander and Sarah Ann Alexander, during their joint lives, and to the survivors or survivor of them during the lives of such survivors or life of such survivor. And from and after the death of the survivor of them the trust fund was to be held as follows, that is to say, " In trust for such of my nephews and nieces (being children of my own brothers and sisters) living at the time of the death of the survivor of them, the said Mary Barber Alexander, Elizabeth Alexander and Sarah Ann Alexander, and for the issue then living of any such nephews and nieces of mine who may have previously died as, being male, shall have attained or shall attain the age of twenty-one years, or, being female, shall have attained or shall attain that age, or shall have married or shall marry under that age, and if more than one as tenants in equal shares per stirpes." On these words four questions of interpretation are raised by this summons.

As regards the first three of these questions no real difficulty arises, and I have already decided, with the assent of counsel for all parties, or at any rate without any argument being adduced to me to the contrary, first that the word " issue " in the clause in question is not confined to children, but includes issue of all degrees ; secondly, that, as between issue of different degrees in the same line of descent, issue of a more remote degree are excluded by issue of a less remote degree ; and thirdly, that issue take as tenants in common and not

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as joint tenants. It is a question raised by amendment as the fourth question on which I have found it necessary to reserve judgment for a short time.

This question is at what stage the stirpital division directed by the will is to begin. Is it to take effect in relation to the stocks of descent of the first or earliest class of takers—namely, the nephews and nieces of the testator, so that these persons are to share not per capita but per stirpes, in which case the first process of division here would be into fourths corresponding with the number of the testator's brothers and sisters whose stocks survived him? Or is it to begin to take effect only in relation to stocks of descent as from the nephews and nieces themselves, so that these persons themselves are to share per capita, in which case the first process of division here would be into nineteenths, corresponding with the number of the testator's nephews and nieces who survived him, either in person or by their stocks?

There has been a very definite conflict of authority in several cases nearly resembling the present, such as *Robinson* v. *Shepherd* (1); *Gibson* v. *Fisher* (2); *In re Wilson* (3); and *In re Dering*. (4)

If the matter were res integra, I must say that for myself I am very strongly impressed with the views expressed by Lord Romilly M.R. in *Gibson* v. *Fisher* (2), and should prefer the decision of that learned judge to the decision on this point of Lord Westbury in *Robinson* v. *Shepherd* (1), except so far as that decision may be due to certain words hereinafter referred to. I cannot see any sufficient reason in general for not giving effect to the words as to stirpital division so as to apply to the first generation of takers. But since those decisions North J., in *In re Wilson* (3), a case almost indistinguishable from the present, has, after very careful consideration, preferred the reasoning of *Robinson* v. *Shepherd* (1) to that of *Gibson* v. *Fisher*. (2) And quite recently Warrington J., in *In re Dering* (4), has followed North J., and, as I read his judgment, has expressed his

(1) 4 D. J. & S. 129.
(2) L. R. 5 Eq. 51.
(3) 24 Ch. D. 664.
(4) 105 L. T. 404.

individual approval of it. Under these circumstances, I should feel bound, in accordance with the ordinary practice of the Court in these matters, to decide in the same way, even were there not present here certain further words which seem to me to point in this direction.

I refer to the words " tenants in equal shares " immediately preceding the words "per stirpes." No such words occurred in either *Gibson* v. *Fisher* (1); *In re Wilson* (2); or *In re Dering* (3); but similar words were used in *Robinson* v. *Shepherd* (4); and, as used in conjunction with a gift per stirpes, were considered almost unintelligible by the Master of the Rolls: see *Robinson* v. *Shepherd.* (5) They are equally puzzling in the present case also; but they may perhaps be explained as referring to the original division of the fund and causing that to be an equal division between all nephews and nieces surviving in person or by their issue, while leaving the phrase " per stirpes " to operate with relation to the secondary introduction of the issue of nephews and nieces. It may well be that the actual decision of Lord Westbury in *Robinson* v. *Shepherd* (4) on this point was affected by the difficulty of explaining the words " in equal shares " were the division to be stirpital throughout, though he does not expressly mention the point. At any rate, in the present case it appears to me easier to reconcile the words " tenants in equal shares " with a stirpital division confined to the stocks of nephews and nieces, than with one extending also to the stocks of the testator's brothers and sisters.

In the result I declare that the trust fund became primarily divisible into a number of parts equal to the number of the testator's nephews and nieces who survived the period of distribution either by themselves or by their stocks. That will be nineteen.

Solicitors: *Devonshire, Monkland & Co.; Withers, Bensons, Birkett & Davies.*

(1) L. R. 5 Eq. 51.
(2) 24 Ch. D. 664.
(3) 105 L. T. 404.
(4) 4 D. J. & S. 129.
(5) 32 Beav. 665.

F. E.

Distinguished. BURGESS *v.* COX [1951] 1 Ch. 383

Distinguished. BURGESS *v.* COX. [1950] 2 All E.R. 1212.

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1919

Feb. 3, 4, 5, 7.

NORTH *v.* LOOMES.

[1918 N. 431.]

Vendor and Purchaser—Agreement—Signed by Agent lawfully authorized—Omission of Term—Specific Performance—Waiver—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 4.

N. verbally agreed with L. to sell to L. certain premises for 590*l.* L. paid to N. 50*l.* as deposit. N. gave L. this receipt: "Received of Mr. Joseph Goddard Loomes the sum of Fifty pounds deposit on the purchase price Five Hundred and Ninety pounds (590*l.*) for the house and premises and land in the occupation of Mr. R. Keene, situate in the High Street, Chinnor, and known as Holmleigh. The balance of the purchase price to be paid on or before March 25, 1918. Purchase price, 590*l.*; Deposit, 50*l.*; Balance, 540*l.* FREDERICK J. NORTH. January 31, 1918." L. sent the receipt to his solicitor, instructing him to carry out the agreement. N.'s solicitor sent to L.'s solicitor a draft contract for perusal and approval. L.'s solicitor wrote back: "I need not trouble you to send me another contract, as the one which your client has signed is, I think, quite sufficient":—

Held, that the letter was a note or memorandum signed by L.'s agent lawfully authorized, so as to satisfy the Statute of Frauds.

Smith v. *Webster* (1876) 3 Ch. D. 49 distinguished.

It had been understood between N. and L. when they entered into the agreement that L. would pay the costs of N. and his own. In an action by N. for specific performance, neither the statement of claim nor the defence referred to costs. The Statute of Frauds was pleaded generally. At the trial the defendant, after the omission of reference to costs in his pleading had ceased to be to his advantage, sought to contend that the receipt was an insufficient memorandum because it contained no reference to costs:—

Held, that the contention was not open to him. But, even if it were, it would not avail, as, a letter of the defendant's solicitor being, and having been accepted by the plaintiff as, a denial of the defendant's liability for costs, the defendant could not set up that liability so as to enable him to bring in the statute.

Semble, where a stipulation solely benefiting one of the parties to a contract of sale of land is omitted from the memorandum as not appearing to either party sufficiently important to be referred to, the party gaining by the omission cannot, in an action against him for specific performance in which the stipulation is not asserted against him, maintain that the memorandum is insufficient by reason of the omission to satisfy the Statute of Frauds, if the plaintiff chooses to waive the stipulation.

Goss v. *Lord Nugent* (1833) 5 B. & Ad. 58 distinguished.

Martin v. *Pycroft* (1852) 2 D. M. & G. 785 and *Vouillon* v. *States* (1856) 25 L. J. (Ch.) 875 considered.

WITNESS ACTION.

At an interview on January 31, 1918, Frederick J. North agreed to sell to Joseph Goddard Loomes freehold premises (then in the occupation of a tenant) at Chinnor, in Oxfordshire. There was bargaining as to price, whether 600*l.* or 590*l.*, but it was agreed at 590*l.*, it being understood that out of the 10*l.* in difference the purchaser would pay the vendor's costs and his own, each estimated at 5*l.* Loomes paid to North 50*l.* by way of deposit, and North drew up and handed to Loomes a receipt, which was regarded by both as their contract, and in which the bargain was recorded as follows:

"Received of Mr. Joseph Goddard Loomes the sum of Fifty pounds deposit on the purchase price Five Hundred and Ninety pounds (590*l.*) for the house and premises and land in the occupation of Mr. R. Keene, situate in the High Street, Chinnor, and known as Holmleigh. The balance of the purchase price to be paid on or before March 25, 1918.

	l.	
Purchase price	590	Frederick J. North.
Deposit	50	January 31, 1918."
Balance	540	

In a day or two Loomes sent the receipt to his solicitor, instructing him that it was the agreement entered into, and that he was to carry it out. At the same time North put the completion in the hands of his solicitor, who, seeing that his client had, if the receipt was the agreement, bound himself by an open contract, sent to Loomes' solicitor a draft formal contract. Loomes' solicitor, seeing that his client had obtained an open contract, would not hear of any further contract, and on February 8 wrote to North's solicitor a letter which he signed and in which he said: "I need not trouble you to send me another contract, as the one which your client has signed is, I think, quite sufficient. As possibly you have not a copy I am sending you one herewith, and shall be pleased to have the abstract of title as early as possible."

On March 2 Loomes' solicitor wrote to North's solicitor, saying: "I am obliged by your letter of yesterday's date

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with the draft conveyance approved and requisitions on title. The arrangement was that the vendor would give vacant possession of the premises on completion, and I am now instructed to say that, provided this is done, my client will pay your charges for deducing title, but not otherwise." After that, no further reference to costs was made. The issue was narrowed down to the question whether under the contract the plaintiff had agreed to give vacant possession, and Loomes insisting on it, North issued a writ on June 27 claiming specific performance of the agreement of January 31. A statement of claim was delivered, in which the plaintiff, alleging acceptance of the title by the defendant, made no mention of any claim for payment of his solicitor's costs. By par. 1 of the defence it was pleaded: "The defendant as to the whole action will rely on the Statute of Frauds, and without prejudice to that defence and in the alternative." The defence went on to allege that it was an express term of the agreement that vacant possession should be given on March 25, denying acceptance of title and making no reference to the question of payment of costs.

C. J. Mathew K.C. and *R. M. Pattisson* for the plaintiff. The receipt and the letter of the defendant's solicitor of February 8 admitting that he was the purchaser together constitute a good contract to satisfy the Statute of Frauds. The question of payment of his solicitor's costs was not pressed by the plaintiff, who was always prepared to waive any claim as to it.

H. Terrell K.C. and *J. G. Wood* for the defendant. Assuming the receipt accepted by the defendant to be otherwise a sufficient memorandum to satisfy the Statute of Frauds, it is not so because it does not set out the whole consideration. If vacant possession was not a term, as the defendant says it was, at any rate on the plaintiff's own showing the payment of the plaintiff's solicitor's costs was part of the consideration, and there is no mention of this in the receipt or in any document that can constitute a memorandum. The plaintiff cannot obviate that by waiving the term. See *Goss* v. *Lord Nugent* (1);

(1) 5 B. & Ad. 58.

Lloyd v. *Nowell*. (1) *Hawksley* v. *Outram* (2) does not apply.

[They also cited *Filby* v. *Hounsell* (3) and *North* v. *Percival*. (4)]

[YOUNGER J. Is not the letter of the defendant's solicitor of March 2, offering payment of the plaintiff's costs on terms, a sufficient memorandum to satisfy the Statute of Frauds signed by the defendant's authorized agent?]

The defendant's solicitor was not authorized to sign any such memorandum. What he was authorized to do was to carry out the existing contract; not to make a new term. See *Smith* v. *Webster*. (5) *Daniels* v. *Trefusis* (6) does not cover such a case. The plaintiff might waive a term of the contract in the memorandum, but he cannot set up the memorandum by waiving a term of the contract not contained in it. See *Williams* v. *Moss' Empires, Ld.* (7); *Morrell* v. *Studd and Millington* (8); *Hickman* v. *Haynes*. (9)

There is no sufficient memorandum. The plaintiff cannot make it sufficient by waiving the term outside. Any addition to the memorandum is not signed by a person authorized to sign. The defendant has sufficiently pleaded the Statute of Frauds to enable him to raise any question as to the statute not having been complied with. The statute must be pleaded; but that is all that is necessary: Rules of Supreme Court, Order XIX., r. 15.

C. J. Mathew K.C. in reply. The agreement as to costs was collateral to the memorandum, and the plaintiff can waive such a collateral agreement: *Gregory* v. *Mighell* (10); *Mundy* v. *Jolliffe*. (11) In any event the defendant cannot raise this defence. His general pleading of the Statute of Frauds is not sufficient to entitle him to do so. Such general pleading is only sufficient when it is alleged that there was no memorandum: *Pullen* v. *Snelus*. (12) There is no reference to the question of costs in the pleadings, and it was never

(1) [1895] 2 Ch. 744.
(2) [1892] 3 Ch. 359.
(3) [1896] 2 Ch. 737.
(4) [1898] 2 Ch. 128.
(5) 3 Ch. D. 49, 57.
(6) [1914] 1 Ch. 788.
(7) [1915] 3 K. B. 242.
(8) [1913] 2 Ch. 648.
(9) (1875) L. R. 10 C. P. 598.
(10) (1811) 18 Ves. 328.
(11) (1839) 5 My. & Cr. 167.
(12) (1879) 40 L. T. 363.

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considered essential until the hearing. It was only thrown in as a make-weight: *John Griffiths Cycle Corporation* v. *Humber & Co.* (1)

[*Terrell K.C.* referred to *Stratford* v. *Bosworth.* (2)]

590*l.* was the actual price agreed. The only difficulty is as to the costs. No sufficient notice of this defence was given on the pleadings.

Cur. adv. vult.

Feb. 7. YOUNGER J., after stating the facts. On the question of possession, I find clearly that there was no such agreement as is alleged. It is not to be found in the receipt; and that followed what I am satisfied was the course of the interview at which it was given. I find against the defendant on this issue.

The only question that remains is that of the Statute of Frauds. The statute is pleaded generally, but the point to which it refers primarily and, as I think for reasons to be given later, exclusively, is that concerning the contract as pleaded in the statement of claim. Is there, of that contract, a sufficient memorandum signed by the defendant or by the agent of the defendant thereunto lawfully authorized? I think there is, and it is contained in Mr. Taylor's letter of February 8. It is not denied that that letter would have been a sufficient memorandum had it been signed by the defendant himself. It is said, however, that Mr. Taylor had no authority to sign such a letter so as in effect to conclude a binding contract between the defendant and the plaintiff, and *Smith* v. *Webster* (3) is relied on in support of that contention. But, in my opinion, that case is easily distinguishable. Mr. Taylor's instructions here were to carry out the contract which his client told him he had already made, and on which he had paid 50*l.* as a deposit. Mr. Taylor had, in fact, the authority which Malins V.-C., in *Smith* v. *Webster* (3), believed that the solicitor there possessed, and it was because the Court of Appeal found that the solicitor

(1) [1899] 2 Q. B. 414. (2) (1813) 2 V. & B. 341.
(3) 3 Ch. D. 49, 57.

possessed no such authority that they disagreed with the judgment of the Vice-Chancellor. "He goes to his solicitor," says James L.J. in that case, "and the only authority he gives his solicitor is to prepare a formal document; he gives him no authority to do anything more." And, as Sargant J., in *Daniels* v. *Trefusis* (1), commenting on *Smith* v. *Webster* (2), says, that case "really decided that the authority of a solicitor to prepare a draft contract did not include, and indeed was inconsistent with, an authority to state, in a binding form and so as to constitute a contract, the rough heads of information which had been given by the client to the solicitor as material on which to draw the formal contract." Very different, however, as I have said, is the case here. Mr. Taylor's instructions from the defendant were to complete, not to negotiate, a contract. It was an essential implication that he should, if and when necessary, affirm on behalf of his client the existence and validity, on his side, of the contract he was so instructed to carry out. His authority to write the letter of February 8 was, therefore, in my opinion, complete, and this defence of the statute fails. And, in my judgment, this finding exhausts and disposes of the defence of the statute in the only way in which on this pleading it can be used.

But it was sought to use the defence of the statute for another purpose, and that attempt I must now examine. It was said that the receipt, now by virtue of the letter of February 8 to be treated as having been signed by the defendant's agent, is an insufficient memorandum of the contract in that it contains no reference to the arrangement as to costs to which I have referred. Is this contention open to the defendant on the defence as it stands? Here it must first be repeated that this provision as a term in the contract between the plaintiff and the defendant is not pleaded by the defendant. The defence of the statute, as pleaded by him, is a defence to the contract as pleaded by the plaintiff or, at most, as added to by the allegation as to possession. That last allegation has been disproved. Therefore it is only to the contract as alleged by the plaintiff that the present

(1) [1914] 1 Ch. 788, 798. (2) 3 Ch. D. 49.

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plea of the statute applies. Now production of a signed memorandum sufficient to comply with the statute in respect of that contract would be a complete answer to that plea. That memorandum has been produced. The plea therefore has been met. Further it must be remembered that the point intended to be raised by the statute must in a pleading be clearly stated: *Pullen* v. *Snelus*. (1) Here this point could not even be conjectured. Therefore, without amending the defence by asserting this additional term, the defence of the statute is not, I think, in this respect open. No amendment is asked for. Is it one that could have been allowed? I think not. It was in reality to the defendant's interest to make in his original pleading no reference to the stipulation as to costs. It was a stipulation to his detriment. It was to his interest, on the defence as drawn, not to avow it. And he did not bring it forward. Its omission from his pleading does not, it is true, now advantage him, but that is only because of his failure to prove the other allegation as to possession which he made. Is he now to be allowed to bring that contention forward, its insertion being now to his interest, because and only because under cover of it he may raise a plea of the Statute of Frauds not hitherto made in such a way as to enable him to rely on this non-compliance? In my opinion, No. This is an instance in which the statute would operate to work an obvious injustice, and it is, I conceive, the duty of the Court in such a case to exercise its discretion in allowing amendments so as to avoid such injustice if it can. In my opinion, therefore, this point is not open to the defendant on his defence as it stands; and an amendment so as to open it is not, even if it were asked for, an amendment proper to be allowed.

But, assuming, contrary to my opinion, that the defence of the statute was, with regard to this matter, open to the defendant, there would still, in my judgment, be in this case a complete answer to that defence. If the letters of February 8 and March 2 are referred to it will be found that Mr. Taylor's letter of March 2 is either an admission of the

(1) 40 L. T. 363.

existence of the bargain with reference to costs set up in an earlier letter or by implication a denial of that bargain with the proposal of a new term. And in fact the letter of March 2 seems to have been taken by the plaintiff as a denial and accepted by him as such, for the claim for costs was not again set up by the plaintiff either in this action or at all. In these circumstances the defendant is in this difficulty. Either the statute is fully complied with, or he is seeking to set up now this obligation of his own not in order to meet it but in order by means of it to escape from his contract on the plea that there has been omitted from the memorandum of that contract an obligation binding on himself as to the existence of which he had previously put forward and obtained the acceptance of his denial.

To my mind the defendant in such circumstances and for such a purpose is not entitled to take that course. The defence of the statute accordingly for this reason would not avail him even if open to him.

In this view of the case it becomes unnecessary for me to deal with the question of far more general interest which emerged from the facts in the course of the argument—namely, whether, where a provision in a contract for the sale of land solely for the benefit of one of the parties to it is omitted from the memorandum because to neither of the parties did it appear of sufficient importance to be referred to, the defendant who gains by the omission can in an action upon the contract in which the stipulation is not asserted against him claim that the memorandum of the contract is insufficient by reason of the omission. It is a question on which no authority has been cited. I can see that much may be urged on either side of it. I will only here say that it is not in my opinion resolved by reference to such a case as *Goss* v. *Lord Nugent*. (1) The gist of that and all like cases is that in them an attempt was made to enforce the omitted term against the defendant. Here the memorandum contains every provision benefiting the defendant; the omission is the omission of a burden upon him, and he is not being asked

(1) 5 B. & Ad. 58.

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to bear it. May in the circumstances the omission not be cured by the plaintiff's waiver of the claim? That is the question which will have to be dealt with on some other occasion.

Since writing the above judgment I have found two cases which appear to have a very material bearing upon the point just referred to. They are *Martin* v. *Pycroft* (1) and *Vouillon* v. *States*. (2) In the first of these cases many of the arguments of the defendant's counsel here are anticipated and disposed of. Together they would appear to establish in principle that there is nothing in the Statute of Frauds to prevent a plaintiff in an action on the contract waiving as against the defendant a stipulation exclusively for his own benefit which formed part of the arrangement between himself and the defendant, although embodied in no memorandum of it signed by or on behalf of the defendant. In other words, the Statute of Frauds would not appear to prevent the application of the principle laid down in *Hawksley* v. *Outram*. (3) It is a satisfaction to me to find that this is so.

There must be the usual decree for specific performance, with costs.

Solicitors for plaintiff: *Lovell, Son & Pitfield, for A. H. Franklin, Oxford.*

Solicitor for defendant: *Lewis W. Taylor.*

(1) 2 D. M. & G. 785. (2) 25 L. J. (Ch.) 875.
(3) [1892] 3 Ch. 359.

A. L.

MARTIN *v.* ECCLES CORPORATION.

YOUNGER J.

1919

Jan. 14, 15, 16; *Feb.* 18.

[1918 M. 1556.]

Education — Non-provided School — Dismissal of Teacher — "Educational Grounds" — Ultra vires Regulation — Right to sue — Education Act, 1902 (2 *Edw.* 7, *c.* 42), *s.* 7, *sub-ss.* (1) (*a*) (*c*), (3).

The plaintiff M. was an assistant mistress in a non-provided school in the borough of Eccles, under an agreement with the managers of January, 1914, the appointment being subject to a month's notice. The other plaintiffs were managers. The defendants were the local education authority of the borough. In January, 1918, the defendants, through their education committee, issued this regulation, which was notified to the managers and to every individual teacher of all non-provided schools: "A teacher shall not be absent from school except for personal sickness without the permission of the education committee obtained through the secretary. Teachers in non-provided schools must also obtain the consent of the managers." On April 23 M., on coming to afternoon school at 2 p.m., found a telegram waiting for her from a young soldier, to whom she afterwards became engaged, saying he was suddenly ordered to France and asking her to meet him at 3.30 at Deansgate, Manchester, forty minutes distant by tram. She told the headmaster she must be absent for the afternoon, and he assented. She went, and returned after school hours. On May 17 the secretary of the defendants' education committee wrote to the managers that, as M., in absenting herself, had not complied with their regulation requiring permission from the committee and the managers, the committee were not prepared to pay her salary after June 30, and suggested to the managers that they should ask her to send in her resignation. The managers regarded M. as one of their best mistresses, and did not ask her to resign; and the defendants ceased to pay her salary. On October 15 the defendants, purporting to act in pursuance of s. 7 of the Education Act, 1902, wrote to the managers directing them to terminate M.'s engagement "on educational grounds," and saying that if they did not do so they themselves would give her notice of dismissal. The managers declined to carry out the direction, and on October 31 the defendants wrote to M. giving her a month's notice. In an action to restrain the defendants from acting on the notice:—

Held, that the regulation issued by the defendants was not in any way binding on teachers in non-provided schools; but (treating it as binding), that no "educational grounds" for dismissal existed, and that the teacher and the managers were alike entitled to come to the Court for relief.

WITNESS ACTION.

The facts were stated by Younger J. as follows: "The first plaintiff in this action, Helen Ryrie Martin, is an assistant

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mistress at the Godfrey Ermen Memorial School at Eccles. The remaining plaintiffs are the present Foundation Managers of the school. The defendants are the local education authority for the borough. The school is a non-provided school, and Miss Martin has served as an assistant mistress in it since July 10, 1913. Her engagement as such is embodied in an agreement in writing between herself and the managers of the school, dated January 14, 1914, and subsequently duly assented to by the defendant corporation as the local education authority. The appointment is indefinite in point of duration, but it is subject to one month's notice on either side. No notice determining it has ever been given by the managers. In their judgment Miss Martin is one of the best mistresses in the school, and her engagement is in no danger of dissolution at their hand. The defendant corporation, however, in alleged pursuance of the powers in that behalf conferred upon them by s. 7 of the Education Act, 1902, have given to Miss Martin 'on educational grounds' a month's notice to terminate her agreement, and the main question in this action is whether there were any such educational grounds to justify such a notice. There is no question here of the sufficiency or insufficiency of these grounds. The sole question in this Court is whether or not they existed. Subordinate to that question are two further contentions raised by the defendants—namely, that, even if no such grounds existed, this Court is without jurisdiction to inquire into the validity of the notice, either at the instance of Miss Martin or at the instance of the plaintiff managers. Now, all the trouble in the case is ultimately traceable to a regulation of the education committee of the defendant corporation, promulgated in the following terms in the month of January, 1918: 'A teacher shall not be absent from school except for personal sickness without the permission of the education committee obtained through the secretary. Teachers in non-provided schools must also obtain the consent of the managers.' It will be observed that this regulation is in terms made to apply to the teachers in every elementary school under the authority—non-provided as well as provided

—and it was in fact notified as soon as it was made to the managers of all the non-provided schools in the area, and to every individual teacher therein, including the plaintiff Miss Martin.

"The competence of the education committee to interpose themselves in such a matter between the teachers in the non-provided schools and the managers who employ them, was not apparently questioned by anyone concerned when the regulation was first made. Needless to say, however, the matter has been very seriously canvassed in these proceedings. For convenience' sake, I do not deal with it at this stage. For the moment I treat the regulation as operative generally according to its terms. It was framed with great care and deliberation, so the secretary of the committee, Mr. Neave, explained in the box. Owing its origin, as it did, to certain incidents that had taken place within the area in which sudden leave of absence had been granted or taken on what appeared to the committee to be insufficient grounds, it was intended to apply as much to cases of sudden emergency as to cases where notice in advance was practicable. When the circumstances of Miss Martin's case, to be stated in a moment, suggested both to the managers and to the National Union of Teachers that cases of emergency had not perhaps been sufficiently regarded by the framers of the regulation, and that such cases at least might be left to the head teacher concerned to be dealt with as they arose, the answer on behalf of the authority was that no alteration of the regulation regarding absence could be made. It is in these circumstances the more remarkable that no arrangements were apparently thought necessary to fit the regulation to such cases. The secretary, Mr. Neave, the local education authority's permanent official, disclaimed the possession in himself of any dispensing power. The chairman of the education committee, he suggested, possessed it and could, in case of need, be communicated with. But, apart from the doubt that the chairman, when wanted, would always be at the end of a telephone, no resolution of the committee delegating that power even to him exists. And the teachers in the non-provided schools are, in the terms of the

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regulation, presented with a difficulty of their own. They must obtain the leave of their managers as well. Indeed, the regulation, as it stands, carefully framed as it was said to have been, and deliberately adhered to as in the present case it was, is quite inapplicable to any case of sudden emergency. Literal compliance with its provisions in such a case must really always be quite impracticable, and, so long as the regulation stands, it exposes every teacher subject to it to the risk, near or remote, of having, in some unforeseen crisis of life, to submit to the disagreeable alternative either of ignoring a duty of recognised obligation or of facing the consequences of a charge of insubordination—which, in the present case, culminated in no less a penalty than a notice of dismissal on 'educational grounds.' The answer made by the defendants to this objection to the terms of their committee's regulation is that it would always be administered generously. The retort of the plaintiffs is to point to their action in the case of Miss Martin.

"On April 23 last, on her arrival at the school for the afternoon session at 2 p.m., she found waiting for her a telegram from her 'young gentleman' (to continue the description of the young soldier, applied to him throughout the proceedings, quite appropriately I do not doubt). The telegram said that he was suddenly ordered to France that night and it asked Miss Martin to meet him at 3.30 at Deansgate, Manchester, 40 minutes distant by tramway. It was a case of going at once or not at all. She was distressed and excited, her excitement perhaps not being lessened by the fact that her engagement to the young man was then only in anticipation and did not become official till a later date. She went at once to the head teacher, Mr. Phillips, with her telegram in her hand. 'I shall have to go,' she said—'I have got a telegram; I am sorry. I will tell you to-morrow what is the reason.' She gave Mr. Phillips the impression, so he told me, that she was so distressed she could not stay. She would not, he added, have been much use as a teacher for the rest of that day. So he gave her leave to go; himself took a class for the afternoon, and arranged for the teacher of that class to take Miss Martin's.

In this way her absence involved no actual interruption in the work of the school.

"There is no doubt Miss Martin was given leave by Mr. Phillips to go. That is not to say that he had much choice in the matter. Refusal would clearly have produced either floods of tears or Manchester, very possibly both. But refusal there was none. Later gossip that there was has no foundation, and it was assumed by the education committee throughout their subsequent action that Mr. Phillips' permission had been both asked for and given. That Mr. Neave very frankly admitted. The remarkable thing is that no one appears to have considered that this permission was any palliation of Miss Martin's supposed offence. At an interview between Miss Martin and Mr. Neave, to which I shall refer later for another purpose, one of Mr. Neave's remarks, so Miss Martin deposed, was that Mr. Phillips had no right to give permission, that she had no right to ask him for it; and this seems to have been the view taken throughout. One would have thought, however, that the teacher's request for leave of absence for an afternoon at least manifested on her part a commendable deference to the authority of the headmaster within the school. It was surely also a circumstance to be taken into account that before she went away she had seen to it that her class would be taken care of during her absence. If Miss Martin's absence from school on this occasion is to be judged from an educational point of view—and no other was within the competence of this authority—these facts would appear most cogent. But to the local education authority, as to Mr. Neave, it seemed otherwise—a conclusion not perhaps so surprising when it is remembered that, although under the code it is the head teacher who is held responsible for general control and supervision of instruction and discipline in the school, the defendants' education committee, by their regulation, made it possible for leave of absence to be granted to assistant teachers by remote authorities without his assent, without even his knowledge. And so the committee reached the conclusion that Mr. Phillips' consent in this case made no difference one way or the other. There was nothing in their regulation about the head teacher. He was

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not authorised to give consent. What, then, had his consent to do with it ?

" So Miss Martin went to Manchester. She there took leave of her ' young gentleman,' who left for the front that night, and she returned to Eccles at 4.30, after school hours. That same afternoon Mr. Phillips, having occasion to see Mr. Neave on other matters, mentioned the incident to him. It is clear Mr. Phillips regarded the regulation of the authority as binding on Miss Martin, and he probably saw that there had been a technical breach of it. Her absence would have to be entered in the log, and he may have considered it convenient to refer to it in advance. There is a slight difference of recollection between the two gentlemen as to some details of their interview. The discrepancy, however, quite natural in the circumstances, is of little importance, it being now accepted on all hands that Mr. Phillips gave Miss Martin leave to go. The actual nature of Miss Martin's summons to Manchester was, as I have said, not then known to Mr. Phillips. He was to be told it the next morning. When he was told, he suggested to Miss Martin that she should go herself and explain things to Mr. Neave, and this she did. She called that very day and told him the whole story of the telegram. Mr. Neave was not responsive : ' Your " young gentleman," ' he said, ' had no right to ask you to leave during school hours.' Possibly this remark may strike some minds as being adequate and appropriate in the circumstances, even when it is remembered that this country was then at the crisis of the war and that this young man with so many others was being hurried to France to save the military situation. It is, however, quite certain that it would not so strike Miss Martin, and for myself, I do not wonder that she was tempted to reply with some spirit : ' I am surprised,' she said (I take the conversation from Mr. Neave's evidence). ' I thought you would have been more sympathetic, as you have sons in the army.' Then Mr. Neave said : ' I am sorry this has happened, Miss Martin : I shall be obliged to report the matter to the Committee, and I do not know what will happen.' ' It is quite obvious what will happen.' ' What is obvious to you ? ' he asked. ' Oh ! they won't want my services after

that,' she said, 'but that won't matter.' Whether she added these last words or not, I am not certain, but I will assume that she did. Even so, they are the only indication in the conduct of Miss Martin throughout this matter of anything remotely savouring of defiance or disrespect to the authority of the defendants or any other authority—her real alleged offence.

"I have purposely set forth in detail—perhaps in too great detail—the full details of Miss Martin's alleged educational misconduct at this time. It is, I think, only thus that the case can be fully appreciated. Nothing further was done by the local education authority until May 17, and on that date Mr. Neave wrote to Mr. Davies, the correspondent of the managers, the following letter: 'I am directed to inform you that on April 23 last Mr. Phillips stated that Miss Helen Martin, a teacher in the Mixed Department of the Godfrey Ermen Memorial School, received a telegram just after the opening of the afternoon school. She appeared to be in great distress, and said she must leave at once. Mr. Phillips did not know the cause of her distress, but on the following day advised Miss Martin to see me. She came on April 24 and told me that she had received the telegram from her "young gentleman," asking her to meet him in Manchester at 3.30 p.m., as he was leaving for France that night. The committee have given careful consideration to this breach of the regulation which requires that "a teacher shall not be absent from school except for personal sickness without the permission of the education committee obtained through the secretary, and that a teacher in a non-provided school must also obtain the consent of the managers." As permission was not sought from either, the committee have reluctantly decided that they are not prepared to pay the salary of Miss Helen Martin after June 30 next, and suggest that the managers should ask Miss Martin to send in her resignation to them.' On May 31 the correspondent of the managers replied: 'With reference to your letter of May 17 I beg to inform you that at a meeting of the managers held last evening it was resolved that before taking any action in the matter referred to in your letter the managers ask to be supplied with the facts on which the decision of the committee

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was based.' On June 1, Mr. Neave replied: 'In reply to your letter of the 31st ult., I beg to inform you that the decision of the committee with regard to Miss Martin was made upon the consideration of the facts as supplied in my letter to you of May 17 last.' The managers did not ask for Miss Martin's resignation, and from June 30 the defendants ceased to pay her salary.

"It may now be convenient to refer to s. 7 of the Act of 1902 on which the powers of the defendants rest. In doing so, I will refer to one or two subsections that will have to be mentioned later on in this judgment. That section is this: [His Lordship read portions of the section (1), and continued:] It will be seen, from what I have read, that it is only on 'educational grounds' that the defendants were entitled

(1) Education Act, 1902, s. 7: "(1) The local education authority shall maintain and keep efficient all public elementary schools within their area which are necessary, and have the control of all expenditure required for that purpose, other than expenditure for which, under this Act, provision is to be made by the managers; but, in the case of a school not provided by them, only so long as the following conditions and provisions are complied with:— (*a*) The managers of the school shall carry out any directions of the local education authority as to the secular instruction to be given in the school, including any directions with respect to the number and educational qualifications of the teachers to be employed for such instruction, and for the dismissal of any teacher on educational grounds; and, if the managers fail to carry out any such direction, the local education authority shall, in addition to their other powers, have the power themselves to carry out the direction in question as if they were the managers; but no direction given under this provision shall be such as to interfere with reasonable facilities for religious instruction during school hours; . . . . (*c*) The consent of the local education authority shall be required to the appointment of teachers, but that consent shall not be withheld except on educational grounds; and the consent of the authority shall also be required to the dismissal of a teacher, unless the dismissal be on grounds connected with the giving of religious instruction in the school; . . . . (3) If any question arises under this section between the local education authority and the managers of a school not provided by the authority, that question shall be determined by the Board of Education. . . . . (7) The managers of a school maintained but not provided by the local education authority shall have all powers of management required for the purpose of carrying out this Act, and shall (subject to the powers of the local education authority under this section) have the exclusive power of appointing and dismissing teachers."

in this case to intervene, and it is to my mind difficult on these grounds to justify their failure to pay this teacher's salary when the managers refused to ask for her resignation. On educational grounds either Miss Martin was fitted to be retained in this school, or she was not. If she was not, she did not become more fitted by being deprived of her salary. The fact that the defendants allowed her to remain confirms me in the conclusion at which I arrive for other reasons, that 'educational grounds' in the ordinary sense of that term had no influence upon their action. Miss Martin's competence as a teacher has never been questioned, although there is no trace that either her general efficiency or the difficulty in the spring or autumn of 1918 in finding a suitable successor for her was considered by the authority as even a factor in the case. The explanation of their attitude, and the only explanation, I think, is that they saw in her action a defiance of their regulation, and that was enough. This position is clearly stated in a letter to the Board of Education before whom the whole question had been laid by the managers. Writing on August 15, 1918, they say: 'The committee feel that the proposed suggestion of the Board would encourage the managers, whose attitude justified the action of a teacher who in a flagrant breach of discipline has defied the regulation of the local education authority, and who has not given any undertaking to comply with it in the future. In view of Miss Martin's conduct and her continued defiant attitude, in which it would appear her managers concur, the committee are not prepared to continue payment of salary to Miss Martin, and the committee hope that in any communication which they address to the managers in the matter, the Board will be able to express the opinion that in the circumstances the committee were acting considerately to both the managers and the teacher in adopting the course which they did, rather than exercising their powers and taking the more drastic step of dismissing the teacher. I do not think that it would be seriously contended that this could not be done on educational grounds, it being a fundamental part of any educational system that discipline should be maintained.'

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"As I have said, nothing was proved before me to justify such a description of Miss Martin's conduct, but Mr. Neave in the box still adhered to the propriety of that letter. I need only say I do not agree with him in the view to which he adhered. Matters might have continued in this way indefinitely, had not the Board of Education, on October 1, 1918, intimated that in their opinion the local education authority appeared to be liable to pay Miss Martin's salary so long as she occupied her then position. Thereupon, on October 15, 1918, the local education authority addressed this notice to the correspondent of the managers: 'Referring to our previous correspondence with reference to the request to the managers of the Godfrey Ermen Memorial School to ask Miss Martin to resign her appointment as certificated assistant in consequence of her absence from school without leave, I am now directed by the education committee to send you the following copy of a resolution which has been passed by them, namely: "That in pursuance of s. 7 of the Education Act, 1902, the managers of the Godfrey Ermen Memorial School be directed to dismiss Miss Helen R. Martin on educational grounds, by giving her one calendar month's notice to terminate the agreement entered into with her on January 14, 1914, in respect of her appointment as a certificated assistant of the said school, and that, if the managers fail to carry out such direction before the 30th instant, the secretary be instructed to give the notice on behalf of the local education authority." I am at the same time to call your special attention to the instruction given to me, that, in the event of your failure to carry out the direction, I am myself to give Miss Martin notice to terminate the agreement in respect of her services. I shall be glad to hear when the managers have had a meeting, and their decision in the matter.' On October 30 the correspondent replies: 'With further reference to your letter of the 15th instant, I beg to say that at a meeting of managers held last night, it was resolved: That they decline to carry out the direction of the local educational authority to dismiss Miss Martin on educational grounds.' And on October 31 this notice was sent to Miss Martin by the local education authority through Mr.

Neave: 'Dear Madam, I am directed by the local education authority to inform you that in pursuance of s. 7 of the Education Act, 1902, they directed the managers of the Godfrey Ermen Memorial School to dismiss you on educational grounds by giving you one calendar month's notice to terminate the agreement entered into with you on January 14, 1914, in respect of your appointment, as a certificated assistant of the said school. The managers having declined to carry out this direction, I am instructed by the local education authority to give you one calendar month's notice to expire on the 30th proximo to terminate the said agreement.' It is the validity of these notices that are in question in the action."

On November 15 the writ was issued for an injunction to restrain the defendants from acting on the notices as to dismissal.

C. J. Mathew K.C. and *A. A. Thomas* for plaintiffs. No educational grounds existed. Miss Martin has a right to sue the local education authority: *Mitchell* v. *East Sussex County Council.* (1) So, also, have the managers: *Gillow* v. *Durham County Council* (2); *West Suffolk County Council* v. *Olorenshaw.* (3) This is not a matter in which the Board of Education has exclusive jurisdiction under sub-s. 3 of s. 7 of the Act. It is not a matter for the Board because by no possibility can it be said that any "educational grounds" existed. The Board can entertain no question as to whether "educational ground" exists; all they can consider is whether, if it exists, it is sufficient.

Hon. Frank Russell K.C. and *Harman* for defendants. If the defendants had power under the Act to do what they did, it is not for the Court to consider whether they acted wisely or not. The sole question is what power the Act gave them. That depends on whether, when they gave notice of dismissal, anything had happened or was likely to happen which would adversely affect the educational efficiency of the school. Miss Martin's behaviour showed her to be a person

(1) (1913) 109 L. T. 778. (2) [1913] A. C. 54.
(3) [1918] 2 K. B. 687.

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on whom the defendants could not rely to carry out her duties. That constituted "educational ground." Any grounds connected with education are "educational grounds." Miss Martin is not being dismissed for insubordination, but because she cannot be relied on for regular continuous attendance at school. If so, there is an end of the case.

But, assuming there were no "educational grounds," Miss Martin has no cause of action: *Young* v. *Cuthbert* (1); *Smith* v. *Macnally* (2); *Blanchard* v. *Dunlop* (3); *Harries* v. *Crawfurd.* (4) If she has the right to sue, the effect is to oust the jurisdiction of the Board of Education under sub-s. 3 of s. 7: *Crocker* v. *Plymouth Corporation.* (5) There is no privity of contract between a teacher in a non-provided school and the local educational authority, so as to enable the teacher to maintain an action. Nor have the managers any right to sue: *Blencowe* v. *Northamptonshire County Council* (6); *West Suffolk County Council* v. *Olorenshaw.* (7) The regulation requiring permission was reasonably made by the local education authority on educational grounds. Sect. 7 of the Act of 1902 simply deals with the relations of the managers and the local education authority to one another, and gives no rights to the teacher at all. Sub-s. 3 strongly supports that view.

[YOUNGER J. Must not the remark, said to be only a dictum, of Lord Haldane L.C. in *Gillow* v. *Durham County Council* (8) be treated as more than a dictum, because the House did entertain the case?]

No, it was never treated as a decision. The whole of s. 7 is governed by, and to be interpreted in the light of, the opening words "maintain and keep efficient." Sub-s. 3 is an answer to the managers bringing an action, and, if so, an answer to the teacher doing so. Miss Martin has no privity of contract with the defendants and s. 7 gives her no statutory right.

C. J. Mathew K.C. in reply. The defendants are doing exactly what s. 7 was intended to prevent—they are

(1) [1906] 1 Ch. 451.
(2) [1912] 1 Ch. 816.
(3) [1917] 1 Ch. 165.
(4) [1918] 2 Ch. 158.
(5) [1906] 1 K. B. 494, 502.
(6) [1907] 1 Ch. 504.
(7) [1918] 2 K. B. 687.
(8) [1913] A. C. 54, 57

interfering with the management of the school by the managers. The dismissal was due to disobedience to the regulation, and that is not within the section. Whether the right exists is a matter for the Court; whether there is sufficient ground for its exercise is for the Board of Education. *Wilford* v. *West Riding of Yorkshire County Council* (1) shows the right of the managers to come to the Court. The Court can make a declaration even where there is no cause of action: *Guaranty Trust Co. of New York* v. *Hannay & Co.* (2); Rules of Supreme Court, Order xxv., r. 5.

Potts, amicus curiæ, referred to *White* v. *Mellin*. (3)

Harman referred to *North Eastern Marine Engineering Co.* v. *Leeds Forge Co.* (4)

C. J. Mathew K.C. This is very near the case of a quasi-contract, because the law has put a third party, the local education authority, in a position to interfere with a contract between the teacher and the managers in certain cases. If the other side is right, the result is that in a case like the present a teacher in a provided school has a cause of action, but a teacher in a non-provided school has none—except through the managers; if she proceeds against the managers, they say "We have not dismissed you"; if against the local education authority, the defendants answer as here, "You are not our servant."

[YOUNGER J. The real solution may be that quoad the contract the local education authority is to be treated for the purposes of s. 7 "as if they were the managers"; so for the purpose of dismissal, and for that purpose only, the defendants would be made parties to the contract.]

Cur. adv. vult.

Feb. 18. YOUNGER J. (after stating the facts as above): At the trial Mr. Russell on behalf of the defendants did not seek to found his "educational grounds" on any such defiance as is referred to in Mr. Neave's letter of August 15, although I am satisfied that was the real ground for the defendants' action. Mr. Russell contended that Miss Martin's absenting herself

(1) [1908] 1 K. B. 685.
(2) [1915] 2 K. B. 536, 562.
(3) [1895] A. C. 154.
(4) [1906] 1 Ch. 324.

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from duty that afternoon in April justified the local education authority in concluding that she was of unpunctual habits and therefore unsuitable for her position on "educational grounds." He also relied, as a justification for their action, on the fact that she broke the regulation of the authority knowing that she was doing so. I hope I have fairly stated Mr. Russell's first contention, but I must say that I cannot see anything in what happened on April 23, 1918, to justify such a conclusion, even if it had been given effect to immediately; certainly not one arrived at so long after the event as October 15 following. In truth, however, the whole circumstances of that afternoon were so exceptional that they furnish no ground for forming any conclusion with reference to Miss Martin's normal standard of duty or practice. It is to my mind impossible to conclude, and it would, I think, be most unfair to her to hold, that what she did on that day was an indication of any kind of unfitness in an educational respect for the most adequate discharge of her duty. Warrington J.'s observations in the case of *Smith* v. *Macnally* (1) may here be applied. Dealing with the case of dismissal with regard to religious education, Warrington J. said: "In my judgment, in order to render a dismissal without the consent of the local education authority a valid dismissal it is necessary not merely that managers should in their own minds consider that there is a ground for dismissal connected with the giving of religious instruction, but there must, in fact, be such a ground." So here there must be in fact an educational ground, and so far I can see none.

But Mr. Russell's second point raises the question I have hitherto reserved—namely, whether this regulation, so open to criticism in its general terms as it is, is in any way binding upon the teachers in the non-provided schools of the local education authority. In my opinion it is not. In my judgment the defendants, in that regulation, have over these teachers assumed an authority which they do not possess. There is no contract between the local education authority and the teachers in such schools. Their contracts are with their managers, and

(1) [1912] 1 Ch. 816, 825.

as Lord Alverstone C.J. said in *Crocker* v. *Plymouth Corporation* (1) "The power of appointing teachers would seem to carry with it the power of fixing their salaries and making contracts as to these salaries to be paid by the managers . . . . it seems to me that the statute recognises bargains so made by the managers which will involve agreements to pay salaries, control by the managers of the duties of the teachers, and dismissal of teachers by the managers—in other words, there is a recognition by the statute that the ordinary contractual relations between managers and teachers remain as before." Now the managers of a non-provided school, as was said by Lord Haldane L.C. in *Gillow* v. *Durham County Council* (2) "are an independent and already existing body, and all that is given to the local education authority is a defined statutory power of interference with them." Residuary powers of management are and remain with the managers. And it appears to me that the matters dealt with in the education committee's regulation in this case are essentially amongst the residuary powers of management to which Lord Haldane L.C. referred and Lord Alverstone C.J. alluded, and are beyond the purview of the defendants. Throughout the whole history of the case, Miss Martin has been supported by her managers, and she has in no respect failed to show the utmost respect to them and to her head teacher. It appears to me that in these matters she owed no duty to anyone else. The authority sought to be exercised over her by the defendants was a usurped authority to which they had no title to require obedience.

The action of the defendants in this case has been elevated to the dignity of a test action. I am not surprised. It raises issues of great moment both to the teachers in non-provided schools and to their managers. It is of the highest importance to the cause of education that neither the managers of such schools on the one hand nor the local education authority on the other should be permitted to overstep the limits set for them respectively by the parliamentary bargain embodied in the Act of 1902. The success of that Act depends on the

(1) [1906] 1 K. B. 494, 501. (2) [1913] A. C. 54, 65.

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equilibrium established by it being in all respects and at all times jealously maintained. It is specially important to such teachers that educational authorities should not be encouraged to make regulations, in this case as I think unreasonable regulations, with reference to their duties and then stigmatize a breach of them as an educational offence, one which, when charged against a teacher in such circumstances, may be fatal to his future professional career, although nobody could ever suppose, if he knew what had happened, that anything whatever of an educational character was involved. It may be, I doubt not that it is, desirable that there should be uniformity of discipline in the provided and non-provided schools in an area. But this can only be properly secured by agreement between the authorities concerned, not the dictation of one of them.

In this case I arrive at the conclusion that no "educational ground" of any kind existed justifying either of the notices in question in this action.

But the defendants raise the contention that, even if there were no "educational grounds" to justify the notice, the plaintiff Miss Martin, and the plaintiff managers, are each of them without a remedy in this Court. As to Miss Martin it is said she has no cause of action against the defendants because s. 7 of the Education Act, 1902, under which the defendants purported to act is, it is said, a section which in no way affects the contract between her and the managers, and merely sets forth the conditions and provisions of the liability thereby thrown upon the defendants to maintain and keep efficient this school, reliance for that contention being placed upon *Young* v. *Cuthbert*. (1) Now it is true that in that case Buckley J. did express some such general view of the section, and his decision was recently followed by Peterson J. in *Harries* v. *Crawfurd*. (2) There is, however, a decision of Warrington J. in *Smith* v. *Macnally* (3), already referred to, in which that learned judge places a different interpretation upon the section, and one which would justify Miss Martin's

(1) [1906] 1 Ch. 451. (2) [1918] 2 Ch. 158.
(3) [1912] 1 Ch. 816.

claim ; and it is noticeable that, while the Court of Appeal has not yet found it necessary in any case to decide between those conflicting views, dicta favouring each of them are not wanting in the books.

In the present case, however, I am not hampered by the difficulty of having to adhere to one or other of them, because not only does *Young* v. *Cuthbert* (1) fail, in my judgment, to cover this case, but the right of Miss Martin to come to the Court in this action is now, I think, a matter of express decision by the Court of Appeal. In *Young* v. *Cuthbert* (1) the only question actually decided was that a notice of dismissal by managers, strictly in accordance with the terms of the teacher's written contract of employment with them, was not rendered invalid by the absence of any consent by the local education authority under s. 7, sub-s. 1 (*c*), of the statute. But the intervention of the authority in this case is not under that sub-section but is under s. 7, sub-s. 1 (*a*), and it amounts to positive action on their part. They have directed the dismissal of Miss Martin on " educational grounds," and, the managers having failed to carry out that direction, they have exercised the power thereby given them " themselves to carry out the direction as if they were the managers," by giving her notice determining her contract. That is to say, being made, as it were, for this purpose statutory parties to Miss Martin's contract, they have given her a notice which they are only entitled to give " on educational grounds." Clearly, therefore, I should have thought Miss Martin on whom that notice has been served is entitled to challenge its validity by showing that no such grounds existed, and, apart from one general expression in Buckley J.'s judgment in *Young* v. *Cuthbert* (1) already cited, I find nothing in it negativing that view. He does, however, say (2) : " There is nothing in the Act to affect the contract between the managers and the teacher. The effect of the provisions of the Act is only to produce certain consequences as between the managers and the local authority if the former act without the consent of the latter in any case in which such consent is required."

(1) [1906] 1 Ch. 451. (2) [1906] 1 Ch. 461.

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These words must, however, I think, in any circumstances be read in the light of the facts of the case before the learned judge: they cannot be extended to those provisions of sub-s. 1 (*a*) which do in the case stated in terms add to the contract; and this has, I think, been so decided by the Court of Appeal.

First of all it is suggested by Pickford L.J. in *Blanchard* v. *Dunlop* (1) where, dealing with the converse case of dismissal by managers on religious grounds, he says: "They had purported to terminate the agreement on religious grounds, and the learned judge found that the grounds on which they had acted were not religious grounds within the meaning of this statute. They therefore had done something which they had no power to do under the circumstances, because they had acted without the authority which is required by the statute. It may be that the plaintiff might be entitled (I do not say whether it is so or not) to take advantage of that by saying, 'You have purported to dismiss me, but, looking at the statute, you have not, under the circumstances, power to dismiss me; your act, therefore, is a nullity, and being a nullity I am entitled to say that I am still a mistress.' It is quite possible that is right, but that is a very long way from this," that is the case then before the Court. That was an indication of the view of the learned Lord Justice, but the point was, however, more directly dealt with in *Mitchell* v. *East Sussex County Council* (2), a case in which a plaintiff a school teacher in a non-provided school, whose contract had on "educational grounds" been determined by notice from the local education authority as in the present case, brought an action to have the notice set aside. There the plaintiff failed because, but only because, he was bound to admit that there were educational grounds on which the defendants had acted. In that case Phillimore L.J., dealing with this point, said (3): "The plaintiff says: 'I do not ask this Court to hold, I did not ask the Court below to hold, that I was not dismissed on educational grounds. I ask this Court to hold that that matter cannot as yet be determined, because it is for the Board of Education to deal

(1) [1917] 1 Ch. 165, 171. (2) 109 L. T. 778.
(3) 109 L. T. 779, 780.

with it.' He is wrong, in my opinion. The matter can be determined by this Court. It is possible it might also be determined by the Board of Education. But it can be determined by this Court, not the quantum of educational grounds, because that is not a matter to be determined by the Court. Whether or not there are educational grounds is a matter which this Court can determine." Swinfen Eady L.J. puts the point in a negative form when he says at the end of his judgment : " The existence of educational grounds for the notice is not impeached or challenged on this motion, and under these circumstances I am of opinion that notice to terminate the plaintiff's engagement having been given and having expired the plaintiff has not made out any case for the interference of the Court." In my opinion, therefore, the plaintiff Miss Martin, having in my judgment established that no " educational grounds " did in her case exist, is entitled to the relief which I will indicate in a moment.

I now proceed to deal with the second objection of the defendants—namely, that the managers are not entitled to maintain this action. This point, although, if I be right so far, it becomes almost academic in this action, is of general importance, and it is, I think, more difficult than the other. It turns upon sub-s. 3 of s. 7 which I have already read. It is said that the effect of that sub-section is to oust the jurisdiction of the Court in any question under the section which arises between the local education authority and the managers of a school not provided by them, and the present is, it is said, such a question. I find it difficult to say it is not, and, if the matter were free from authority, I might have felt compelled to hold, however reluctantly, that it was. But the extent of the sub-section has been dealt with by the House of Lords in one case directly and in another by implication, with the result that I feel myself entitled to hold that this question of law—namely, whether or not " educational grounds " exist—is outside the sub-section altogether. In other words, while the sufficiency or insufficiency of such grounds, assuming them to exist, would under the sub-section be a question, and pre-eminently a question, for the Board, the existence or non-existence of such grounds,

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a question of law, remains one for the Court to determine. Thus, in *Gillow* v. *Durham County Council* (1) Lord Haldane L.C. in an interlocutory observation, acted upon by the House, said: "That sub-section"—that is sub-s. 3—"was not intended to apply to a far-reaching question of law like the present one." That was a case with regard to the employment of a caretaker of a school. In the same way the House of Lords in *Attorney-General* v. *West Riding of Yorkshire County Council* (2) must implicitly have taken the same view. In each case the House assumed jurisdiction, and it is of course manifest that such an assumption must have been deliberate and not by assent of parties, for jurisdiction cannot be given by such assent. See *Wilford* v. *West Riding of Yorkshire County Council.* (3)

I hold, therefore, following these authorities, that the Court has jurisdiction to determine this question, even as between the managers and the local education authority. I propose accordingly to declare that the direction given by the defendants to the managers on October 15, 1918, and the notice served by them upon the plaintiff Miss Martin on October 31, 1918, are each of them invalid and inoperative, and that the engagement of the plaintiff Miss Martin under her contract of January 14, 1914, assented to by the defendants, is unaffected thereby. The defendants will pay the costs of the action.

C. J. Mathew K.C. We treat the record by consent as amended by adding the two representative managers as defendants?

YOUNGER J. Yes.

Solicitors for plaintiffs: *Baker & Nairne.*

Solicitors for defendants: *Sharpe, Pritchard & Co., for Town Clerk, Eccles.*

(1) [1913] A. C. 54, 57. (2) [1907] A. C. 29.
(3) [1908] 1 K. B. 685, 698.

A. L.

LITCHFIELD-SPEER *v.* QUEEN ANNE'S GATE SYNDICATE (No. 2), LIMITED.

P. O. LAWRENCE J.

1919

Jan. 28, 29, 30, 31; *Feb.* 3, 10.

[1918 L. 991.]

Ancient Lights—Threatened Obstruction—Quia timet Action for Injunction—Prospective Damage substantial—Declaratory Judgment—Costs.

The decision in *Colls* v. *Home and Colonial Stores* [1904] A. C. 179 has not abrogated the jurisdiction of the Court to grant an injunction in a quia timet action to restrain the threatened obstruction of ancient lights if the evidence shows that the new buildings when completed will be an actionable nuisance.

The Court has discretion to make an order declaratory of the plaintiffs' rights with liberty to apply for an injunction if it should become necessary.

Quære, whether the Court in such an action has jurisdiction to award damages in lieu of an injunction even if it appears that the threatened injury can be adequately compensated by a moderate money payment.

WITNESS ACTION.

The plaintiff, Mrs. Litchfield-Speer, was the owner in fee, and her co-plaintiff Mr. Schuster was the owner of a long lease and the occupier, of No. 22 Old Queen Street, Westminster. Old Queen Street was thirty feet in width and ran east and west, and No. 22 faced the north side of the street. Directly opposite No. 22 and on the south side of the street was No. 23 Old Queen Street, and on the west side of and immediately adjoining No. 23 were Nos. 25 and 27 Old Queen Street. The old buildings of Nos. 23, 25 and 27 were pulled down, and the defendants commenced to erect new buildings on the sites of Nos. 25 and 27. Thereupon on August 28, 1918, the plaintiffs issued their writ claiming an injunction to restrain the defendants from building so as to obstruct their ancient lights. On motion for an interim order the defendants gave an undertaking not to erect their new buildings above the height of the old buildings, and the trial of the action was expedited. By their statement of claim the plaintiffs alleged that all the windows of No. 22 facing Old Queen Street—some thirteen in number—were ancient lights, and alleged that if the new buildings in course

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of erection on the sites of Nos. 25 and 27 were completed as contemplated they would materially diminish the light coming to the plaintiffs' windows and would constitute a nuisance or illegal obstruction to their ancient lights, and they claimed an injunction accordingly; but at the trial the plaintiffs abandoned the claim of obstruction to all their ancient lights above the ground floor and limited their case to four of the windows—namely, the two windows of the kitchen in the basement and the two windows of the music room on the ground floor of No. 22. The action now came on for trial and the new buildings of Nos. 25 and 27 had not reached the height of the old buildings. At the request of both parties the judge visited the premises.

It appeared that the kitchen being in the basement, the light coming into it through its two windows was poor at all times, necessitating the use of artificial light throughout the day on most days in the year, but the music room was a well-lighted room. The old buildings of Nos. 25 and 27 were thirty-five feet high to the coping of the parapet and above that had a sloping roof which was carried up a further height of eleven feet, making a total height of forty-six feet from the ground level to the ridge of the roof. The new buildings would, when completed, be sixty-four feet high to the coping of the parapet and eighty-three feet to the ridge of the roof. The light which came to the plaintiffs' windows in question from across No. 23 was direct, and the light that used to come to them from over the roofs of the old buildings of Nos. 25 and 27 was almost entirely lateral. There was a direct conflict of expert evidence as to what would be the result if the new buildings were completed as contemplated. The plaintiffs' experts deposed that the light coming to the plaintiffs' four windows would be seriously diminished, there would be substantial obstruction rendering the rooms less comfortable and depreciating the letting or selling value of the premises by about 40*l.* per annum, which they capitalized at 800*l.* On the other hand, the defendants' experts asserted that although there would be some diminution of light the kitchen, owing to its position, would not be appreciably affected, that the

music room would not cease to be a well-lighted room, and that, from a valuer's point of view, there would be no material loss or damage to the letting or selling value of the premises.

Ward Coldridge K.C. and *G. A. Scott* for the plaintiffs submitted that they were entitled to an injunction.

Jenkins K.C. and *Vaisey* for the defendants. The obstruction of ancient lights is a nuisance at common law, and to obtain damages or an injunction a plaintiff must prove substantial privation of light sufficient to render the house uncomfortable: *Colls* v. *Home and Colonial Stores* (1); *Back* v. *Stacey*. (2) It is not a question of how much light is taken away, but whether what remains is sufficient for the reasonable use and enjoyment of the property: *Higgins* v. *Betts*. (3) On our evidence no nuisance will be caused by the new buildings. An action at common law will not lie because the plaintiffs have sustained no damage, and it is submitted that since *Colls' Case* (1) a Court of Equity will not grant an injunction in a quia timet action unless the evidence shows that damage will inevitably result and that the resultant damage will be irreparable: *Earl of Ripon* v. *Hobart* (4); *Elwell* v. *Crowther* (5); *Pattisson* v. *Gilford* (6); *Fletcher* v. *Bealey* (7); *Attorney-General* v. *Manchester Corporation*. (8) The onus is on the plaintiffs. There is a direct conflict of expert evidence, and it is submitted the action should be dismissed. The plaintiffs can bring another action if our new buildings should prove to be a nuisance. The Court can always order an offending building to be pulled down. There is no reported case of a quia timet action since *Colls' Case* (1), in which the new buildings had not reached the height of the old buildings at the date of the writ. But if the Court thinks the plaintiffs are entitled to an injunction we ask that damages may be awarded in lieu of an injunction. The plaintiffs' evidence of damage is exaggerated and the threatened obstruction can be adequately compensated by

(1) [1904] A. C. 179, 186, 194.
(2) (1826) 2 C. & P. 465.
(3) [1905] 2 Ch. 210, 214.
(4) (1834) 3 My. & K. 169.
(5) (1862) 31 Beav. 163, 169.
(6) (1874) L. R. 18 Eq. 259, 261.
(7) (1885) 28 Ch. D. 688, 698.
(8) [1893] 2 Ch. 87, 93.

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the payment of a moderate sum of money: *Shelfer* v. *City of London Electric Lighting Co.* (1) On the authorities it is doubtful whether the Court has jurisdiction to award damages where no injury has arisen: *Dreyfus* v. *Peruvian Guano Co.* (2); *Martin* v. *Price* (3); *Cowper* v. *Laidler* (4); but it is submitted the Court must have a discretion in the matter; or perhaps the Court can now make an order declaratory of the plaintiffs' rights with liberty to apply for an injunction if it should become necessary.

[P. O. LAWRENCE J. What do you say as to the costs of the action? My present view is that the kitchen windows will not be substantially obstructed, but I am against you on the music room.]

The plaintiffs put their case much too high. They claimed in their particulars for all their thirteen windows and have given evidence only on four windows and have failed on two of them. We ask for the costs of the issues on which we have succeeded with the usual set off, or that the plaintiffs should have the costs of the action except so far as they have been increased by the issues on which they have failed.

[P. O. LAWRENCE J. I think the defendants should pay one-half of the plaintiffs' costs of the action.]

We should prefer that order if we cannot have the costs of the issues we have won.

Ward Coldridge K.C. in reply. The fact that the kitchen is not a well-lighted room makes the obstruction of its light a matter of aggravation. A substantial interference with the plaintiffs' light is threatened and their right of action is clear: *Salvin* v. *North Brancepeth Coal Co.* (5) We ask for an injunction in the form settled in *Yates* v. *Jack* (6), with the modification suggested by Lord Macnaghten in *Colls* v. *Home and Colonial Stores.* (7) But if the Court thinks fit to make a declaratory judgment with liberty to apply we do not object.

Cur. adv. vult.

(1) [1895] 1 Ch. 287.
(2) (1889) 43 Ch. D. 316.
(3) [1894] 1 Ch. 276, 284.
(4) [1903] 2 Ch. 337.
(5) (1874) L. R. 9 Ch. 705, 713.
(6) (1866) L. R. 1 Ch. 295.
(7) [1904] A. C. 179, 194.

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Feb. 10. P. O. LAWRENCE J., in a considered judgment, after stating the facts, proceeded: The plaintiffs' case is that the new buildings when completed will materially diminish the light coming through the windows to the kitchen and music room, and they claim an injunction to restrain the defendants from continuing the erection of the new buildings so as to cause a nuisance or illegal obstruction to their ancient lights. From the foregoing statement it will be seen that this action is purely a quia timet action.

Mr. Jenkins, on behalf of the defendants, has argued that the plaintiffs have no cause of action at law as no damages have in fact been sustained by them, and further that the plaintiffs have no cause of action in equity because a Court of Equity has no jurisdiction to entertain (or if that is putting it too high that it is contrary to the practice of a Court of Equity to entertain) a quia timet action unless both of the following two conditions are fulfilled—namely, first, unless the act sought to be restrained will inevitably result in substantial damage, and secondly, unless such resultant damage will be irreparable. In order to judge of the soundness of the proposition so advanced it is necessary in the first instance to arrive at an understanding as to what is meant by the term "irreparable damage." If by that term is meant that there must be no physical possibility of repairing the damage then I dissent from the proposition; but if the term is used in the sense in which the Court generally uses it in this class of cases, and all that is meant is that the damage must be substantial and one which could not be adequately remedied by a pecuniary payment, I am not disposed to quarrel with the proposition. Now I have been reminded that since the decision in *Colls* v. *Home and Colonial Stores* (1) the question to be determined in every case of obstruction to ancient lights is not merely how much light has been obstructed but rather how much light is left and whether the dominant tenement, or the particular room in the dominant tenement, has by reason of the obstruction been rendered uncomfortable and substantially less suitable for the ordinary purposes of

(1) [1904] A. C. 179.

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inhabitancy or business according to the ordinary notions of mankind, regard being had to the locality in which the premises are situate. I need hardly say that in deciding this case I intend to follow the principles laid down in *Colls' Case* (1) and the subsequent cases on this subject.

It has been stated by Mr. Jenkins that since the decision in *Colls' Case* (1) there is no reported case of any purely quia timet action for threatened obstruction of ancient lights, and I have not been referred to any reported case where the proposed new buildings had not exceeded the height of the old buildings at the date of the issue of the writ. It is contended that the reason for this absence of authority is because no such action will lie, since in no case of obstruction to ancient lights can it be said that the damage is irreparable as the new buildings can always be ordered to be pulled down. I do not agree with this contention. Whatever may be the true explanation of the alleged absence of reported cases I think that the principles which are applicable to actions of this class since the decision in *Colls' Case* (1) are not in doubt. An action to restrain a threatened obstruction of ancient lights is in my opinion governed by precisely the same principles as those which govern an action to restrain any other apprehended nuisance. In all cases of apprehended nuisance the authorities show that if the plaintiff proves that he will certainly sustain substantial damage by what the defendant is about to do the Court will restrain the defendant from doing the act and will not wait until the plaintiff has sustained the damage. If, however, the act which it is sought to restrain is an act which is in itself lawful and does not per se constitute a nuisance, the Court will not in general restrain it although the consequence of the act may be that a nuisance will result. The cases cited by Mr. Jenkins (which are only a selection from the numerous authorities on this subject) sufficiently illustrate the latter principle, e.g., the Court will not restrain the erection of an engine which is not objectionable in itself but may only become so if it is worked in a certain manner: *Earl of Ripon* v. *Hobart* (2), nor the deposit

(1) [1904] A. C. 179. (2) 3 My. & K. 169.

of a refuse heap which only becomes objectionable if the liquid oozing from it is not diverted: *Fletcher* v. *Bealey* (1), nor the erection of a small-pox hospital where it is not proved that it will, when used for small-pox patients, necessarily cause infection: *Attorney-General* v. *Manchester Corporation*. (2) If it were true to say that no quia timet action for a threatened obstruction of ancient lights will lie because the Court can order the offending building to be pulled down, the owner of the dominant tenement (although he knows that it is intended to take the offending building to a height at which it must necessarily be a nuisance) would have to wait until the offending building had reached a height at which he could safely rely upon being able to prove that it had already caused a nuisance before he could issue his writ—a result much to be deprecated in the interests both of the owner of the dominant tenement and of the building owner. Before the decision in *Colls' Case* (3) the Court always regarded with favour a plaintiff who came for relief promptly after he had become aware of the intentions of the building owner. In my judgment the decision in *Colls' Case* (3) has not abrogated the jurisdiction of the Court to entertain quia timet actions in cases of obstruction of ancient lights, and for my own part, until I am corrected by a higher tribunal, I shall still regard favourably a plaintiff who comes promptly, although I realize that the onus upon him to prove that a nuisance will result from the defendants' buildings involves his adducing different evidence to that which was formerly required and is probably more difficult to discharge than it was when he had merely to prove that the new buildings would obstruct a certain quantity of light. In a really doubtful case it may be that it is the duty of the Court to hold that the plaintiff ought to have waited and ascertained the result of the erection of the new building before bringing his action, but I do not think that the Court ought to adopt this course merely because the question whether an illegal obstruction will result is one upon which there may be an honest difference of opinion.

(1) 28 Ch. D. 688. (2) [1893] 2 Ch. 87.
(3) [1904] A. C. 179.

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In all purely quia timet actions of this kind the Court must to a great extent, if not altogether, be guided by expert evidence which is hardly ever wholly satisfactory, as experts generally become advocates in the witness box and it is not often possible to shake their opinions, which they are paid to maintain, by cross-examination. In spite of this difficulty however I consider that it is the duty of the judge, whenever possible, to make up his mind as to the value of the opinions expressed by the expert witnesses, and, if he is convinced one way or the other, to give effect to the conclusion at which he has arrived. In the present case I have arrived at a clear conclusion as to the weight to be attached to the evidence given on both sides and as to the true result to be deduced from the opinions given by the experts who were called before me. I intend, therefore, to decide the case and not to accept the tempting invitation to adopt the easier course of holding that, as there is a conflict of expert evidence as to whether the defendants' buildings will be a nuisance or not, the action ought to be dismissed and the plaintiffs left to bring another action when the new buildings are complete if he then finds that his ancient lights have been illegally obstructed.

[His Lordship then considered the evidence at length and came to the conclusion, with regard to the kitchen, that the new buildings would not be a nuisance; but, with regard to the music room, that the new buildings if completed as intended would materially affect the light coming to the windows of that room and would render it uncomfortable and substantially less suitable for the purposes of inhabitancy or business, and continued:] In coming to this conclusion I have not overlooked the fact that the site of No. 23 Old Queen Street is vacant and that a considerable amount of light is at present derived over this vacant site which light will be obstructed again if and when No. 23 is rebuilt. In stating that I substantially accept the evidence of the plaintiffs' witnesses I must not be understood as holding that the selling and letting value of the plaintiffs' premises would be diminished to the full extent deposed to by those witnesses. My view is that the amount of the damage in this respect

has been placed somewhat too high, but that there would be a substantial loss in the selling and letting value if the new buildings are allowed to proceed to their proposed height I have no doubt.

Mr. Jenkins has invited me, if I should come to the conclusion that the new buildings will cause a nuisance, to award damages in lieu of granting an injunction. He has however very properly drawn my attention to the cases which show that it is extremely doubtful whether the Court has power in a quia timet action to give damages in lieu of granting an injunction. I do not propose to consider whether the Court has any such power, as I have come to the conclusion in this case that the plaintiffs are entitled to an injunction. To refuse an injunction and award damages would mean compelling the plaintiffs to submit to a permanent nuisance seriously affecting the comfort and value of their property in consideration of a money payment. This, even if I had the power, I do not intend to do. Mr. Jenkins has further urged that, even if I were to hold that the plaintiffs are entitled to an injunction, I should not grant an injunction at the present time but should make a declaration with liberty to apply for an injunction in case it should hereafter become necessary, which he did not anticipate. In the circumstances of this case I think this request is not unreasonable, and Mr. Coldridge on behalf of the plaintiffs has not seriously resisted my adopting this course. I therefore make a declaration that the defendants are not entitled to erect any buildings so as to cause a nuisance or illegal obstruction to the plaintiffs' ancient windows in the music room at No. 22 Old Queen Street as the same existed previously to the taking down of the houses known as Nos. 25 and 27 Old Queen Street which formerly stood on the site of the defendants' new buildings, with liberty to apply for an injunction and generally.

There remains the important question of the costs of this action. [His Lordship then considered all the circumstances of the case and came to the conclusion that justice would be done by ordering the defendants to pay to the plaintiffs

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one-half of their costs of the action, and making no order as to the rest of the costs of the action.]

Solicitors for the plaintiffs: *Trollope & Winckworth.*
Solicitors for the defendants: *Preston & Foster.*

H. L. F.

ASTBURY J.

1919

Feb. 18, 25.

In re LEVI & COMPANY, LIMITED.

[00203 of 1918.]

Company—Voluntary Liquidation—Leasehold Premises—Occupation by Liquidators for Purposes of Liquidation—Dilapidations—Breach of repairing Covenant—Right of Reversioner to be paid in full—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 171, 187, 196, 211.

The company was the assignee of a lease for a term of twenty-one years at an annual rent of 875*l.* and subject to usual repairing covenants, including a covenant to deliver up the premises in good repair at the end of the term, with a proviso for re-entry on breach of covenants. In 1910 the company went into voluntary liquidation, and the liquidators elected to continue their possession under the lease, and remained in possession until the lease expired in 1917, paying the rent reserved by the lease in full, and themselves receiving a large profit rental from their underlessees. On the termination of the lease it was estimated that an expenditure of some 400*l.* to 500*l.* was required in order to comply with the lessees' covenants contained in the lease:—

Held, that the reversioners were entitled to be paid this sum in full and not merely to prove for it in the liquidation.

The principle stated in *In re Oak Pits Colliery Co.* (1882) 21 Ch. D. 322, 329; *In re Lundy Granite Co.* (1871) L. R. 6 Ch. 462, 466; *In re Silkstone and Dodworth Coal and Iron Co.* (1881) 17 Ch. D. 158, 160; *In re Brown, Bayley & Dixon* (1881) 18 Ch. D. 649, 652; *In re National Arms and Ammunition Co.* (1885) 28 Ch. D. 474, 478, and *Hand* v. *Blow* [1901] 2 Ch. 721, 736, applied.

THIS was a summons taken out by the liquidators in the voluntary liquidation of the company that it might be determined whether the respondents were entitled to be paid the full amount of their claim for dilapidations under the lessees' covenants contained in a lease dated June 15, 1896, or whether

they were only entitled to prove for dividends in respect of such claim and if so to what extent.

By an indenture of lease dated June 15, 1896, made between the reversioners of the one part and Moses Levi and Moses Jourado of the other part a messuage and premises known as 59 St. Mary's Axe in the City of London were demised to the lessees for the term of twenty-one years from June 24, 1896, at a yearly rent of 600*l.* and subject to usual repairing covenants by the lessees including a covenant to deliver up the premises in good and substantial repair at the end of the term and subject to a usual proviso for re-entry on breach of any of the lessees' covenants.

By an indenture of an agreement dated April 11, 1901, the premises were assigned to Levi Jourado & Co. (who had since changed their name to Levi & Co.) for the residue of the said term at the rent and subject to the lessees' covenants and conditions contained in the said lease.

Originally the premises were warehouses but they were converted into offices under licences granted to the company by the reversioners under which the yearly rent of 600*l.* had been increased to 875*l.*

On May 26, 1910, the company went into voluntary liquidation and the liquidators elected to continue their possession under the lease and remained in possession until the lease expired on June 24, 1917, paying the rent to the reversioners in full and themselves receiving a large profit rental from their own under-lessees.

Shortly before the expiration of the term surveyors acting on behalf of the reversioners inspected the premises and served a notice requiring certain repairs to be done in compliance with the covenants in the lease at an estimate of between 400*l.* and 500*l.*, but no further steps were taken before the expiration of the lease.

F. K. Archer for the liquidators. The reversioners are only entitled to prove for dividends in respect of this claim. I do not dispute that the liquidators having remained in possession under the lease for the purposes of the winding up,

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the rent accrued due since the winding up was properly paid in full according to the well-established rule. See Companies (Consolidation) Act, 1908, ss. 186, sub-s. (1), 206, 211, 171, 196; *In re Oak Pits Colliery Co.* (1); *In re Lundy Granite Co.* (2); *Horsey's Claim* (3); *In re New Oriental Bank Corporation (No. 2)* (4); *In re Silkstone and Dodworth Coal and Iron Co.* (5); *In re Brown, Bayley & Dixon* (6); *In re South Kensington Co-operative Stores* (7); Buckley on Companies, 9th ed., p. 336. But there is no direct authority that this rule as to rent applies to the amount assessable in respect of dilapidations under the repairing covenants contained in the lease during the liquidator's possession, and my submission is that it does not, and that as a matter of principle the reversioners can only prove in the liquidation for the amount. It was open to the reversioners during the continuance of the lease to have taken proceedings for breaches of the repairing covenants as they occurred or to have exercised their right of re-entry and so imposed their own terms on the liquidators. This they did not do, and it is too late after the determination of the lease to make this claim for payment in full. The claim for dilapidations does not stand on the same footing as rent and is not payable as part of the costs, charges and expenses incurred in the winding up within ss. 171 and 196 of the Act. It is also to be observed that r. 96 of the Companies (Winding-up) Rules, 1909, providing for proof in respect of rent or other periodical payments, expressly provides that where the liquidator remains in occupation nothing in the rule contained shall affect the landlord's right to claim payment of "rent" during the liquidator's occupation and makes no mention of any claim for dilapidations.

Bryan Farrer for the reversioners. The reversioners are entitled to be paid the amount of their claim in full. The principle laid down in the authorities is that if the liquidators continue in the possession of leasehold property for the

(1) 21 Ch. D. 322.
(2) L. R. 6 Ch. 462.
(3) (1868) L. R. 5 Eq. 561.
(4) [1895] 1 Ch. 753.
(5) 17 Ch. D. 158.
(6) 18 Ch. D. 649.
(7) (1881) 17 Ch. D. 161.

purposes of the liquidation generally they must continue to hold it on the terms and conditions of the lease, and there is no difference between their obligation to pay rent in full and to pay in full the amount necessary to discharge the repairing covenants contained in the lease under which they hold. The statements of the general principle in *In re Brown, Bayley & Dixon* (1); *In re National Arms and Ammunition Co.* (2); and *Hand* v. *Blow* (3) are directly in point and govern the present case.

ASTBURY J. This summons has been taken out by the liquidators in the voluntary liquidation of the company for the purpose of determining the question whether the respondents are entitled to be paid the full amount of their claim for dilapidations under the lessees' covenants contained in the lease under which the liquidators held. [His Lordship stated the facts, and continued:] It is suggested that some portion of the dilapidations may have been caused before the commencement of the liquidation, but that consideration is of no importance in the present case, having regard to the covenant by the lessees to deliver up the premises in good repair at the expiration of the term.

At the date of the liquidation three courses were open to the liquidators. They might have given up possession to the reversioners, or they might have sold the premises for the residue of the term and have provided the reversioners with a new tenant competent to perform the covenants in the lease, or they might have retained possession of the premises under the lease for the purposes and for the benefit of the liquidation generally. The latter course is the one which they elected to adopt, and as the result of so doing they have during the continuance of the lease received, I am told, some 6000*l.* by way of increased rental over and above what they themselves paid to the reversioners by way of rent. It has not been disputed that the liquidators having elected to retain possession of the premises became responsible to pay

(1) 18 Ch. D. 649, 652. (2) 28 Ch. D. 474, 478.
(3) [1901] 2 Ch. 721, 736.

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in full the rent reserved by the lease from the date of the liquidation, and as a matter of fact they have done so; but the question remains to be decided whether the reversioners are also entitled to be paid in full the amount properly assessable in respect of dilapidations under the repairing covenants contained in the lease. I am told that there is no direct authority on the exact point, a fact which has caused me some surprise because it must have been a matter of common occurrence that a liquidator has retained possession of leasehold premises for the benefit of the liquidation under circumstances similar to those of the present case.

The relevant sections of the Companies (Consolidation) Act, 1908, are s. 186, which by sub-s. (1) provides that on the voluntary winding up of a company "the property of the company shall be applied in satisfaction of its liabilities pari passu . . . "; s. 211, which provides that "where any company . . . is being wound up by or subject to the supervision of the Court, any . . . distress or execution put in force against the estate or effects of the company after the commencement of the winding up shall be void to all intents"; s. 171, which provides that "the Court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the assets of the costs, charges, and expenses incurred in the winding up in such order of priority as the Court thinks just"; and s. 196, which provides that "all costs, charges, and expenses properly incurred in the voluntary winding up of a company, including the remuneration of the liquidator, shall be payable out of the assets of the company in priority to all other claims." With regard to rent accruing after the date of the winding up the law is laid down by Lindley L.J. in *In re Oak Pits Colliery Co.* (1) as follows, "If the liquidator has retained possession for the purposes of the winding up, or if he has used the property for carrying on the company's business, or has kept the property in order to sell it or to do the best he can with it, the landlord will be allowed to distrain for rent which has become due since the winding up"; and a little further on, "When the liquidator retains the property

(1) 21 Ch. D. 322, 330.

for the purpose of advantageously disposing of it, or when he continues to use it, the rent of it ought to be regarded as a debt contracted for the purpose of winding up the company, and ought to be paid in full like any other debt or expense properly incurred by the liquidator for the same purpose." In *In re Lundy Granite Co.* (1) James L.J. said:—"But in some cases between the landlord and the company, if the company, for its own purposes and with a view to the realisation of the property to better advantage, remains in possession of the estate, which the lessor is therefore not able to obtain possession of, common sense and ordinary justice require the Court to see that the landlord receives the full value of the property. He must have the same rights as any other creditor, and if the company choose to keep the estate for their own purposes, they ought to pay the full value to the landlord, as they ought to pay any other person for anything else, and the Court ought to take care that he receives it."

That being the general rule as to rent the question is whether the same rule ought not to apply to the sum now in dispute. In *In re Silkstone and Dodworth Coal and Iron Co.* (2) Fry J. after referring to the facts of that case said, "That is, in my view, an election by the liquidator to continue in possession of the property, and if he continued in the possession of the property he could only do so upon the terms of the lease, and it is only equitable, if he keeps the lease as an asset of the company and for the purposes of the liquidation, that he should satisfy those conditions upon which the asset remains his"; and the same learned judge in *In re Brown, Bayley & Dixon* (3) says:—"In respect of any rights arising after the winding up by reason of the company or the liquidators remaining in possession of the demised or of the mortgaged premises, they ought, in my judgment, to be treated as independent persons, and if the company or the liquidator choose to remain in possession of the demised or mortgaged premises, they must so remain upon the terms and conditions of the

(1) L. R. 6 Ch. 462, 466. (2) 17 Ch. D. 158, 160.
(3) 18 Ch. D. 649, 652.

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instrument; just as any other person must observe those terms"; and a similar principle as to rates was applied in *In re National Arms and Ammunition Co.* (1), where Baggallay L.J. says, "The effect of the decision in *In re Lundy Granite Co.* (2) is that if a company in course of being wound up remains by its liquidator in possession of leasehold property, for its own purposes and with a view to the realisation of its property to better advantage, the Court will aid the landlord in obtaining the payment in full of the rent accrued due after the commencement of the liquidation. The principle on which that case was decided applies equally to other outgoings connected with property the possession of which is retained for the purpose of more advantageously winding up the affairs of the company"; and in the same case (3) Fry L.J. states the principle thus, "When a company is wound up, the creditors who are such at the commencement of the winding up stand on an equal footing as between themselves. But if after that period the company or the liquidator on its behalf, in order to acquire gain or to avoid loss, enter into contracts or occupy land, they must do so on the same terms as any other subjects of Her Majesty, and neither the persons with whom the contracts are entered into, nor the persons to whom sums in respect of the land are payable, whether landlords or rating authorities, are bound to accept a dividend on their claims. I am of opinion, therefore, that the rates in question must be paid in full"; and lastly in *Hand* v. *Blow* (4), Romer L.J. said, "If you have a company or person whose estate is being dealt with or administered by the Court, and a liquidator or receiver appointed by the Court has occupied or used premises that are part of the estate, then, as to rent and other outgoings payable to the landlord or other parties in respect of the premises for that occupation or user and for which the company or person whose estate is being dealt with or administered is liable, the Court will see that such rent and other outgoings are paid out of the assets got in by the liquidator or receiver."

(1) 28 Ch. D. 474, 478.
(2) L. R. 6 Ch. 462.
(3) 28 Ch. D. 481.
(4) [1901] 2 Ch. 721, 736.

Now that being the rule in a compulsory liquidation, the same principle equally applies to a voluntary liquidation. The liquidators in the present case knew the contents of this lease at the time when they elected to continue in possession of this beneficial term, and it would in my opinion be highly inequitable to allow them to enjoy the benefit and disregard the covenants of the lease. It is suggested that the reversioners should from time to time have sought to re-enter for breach of the repairing covenants or have imposed terms on the liquidators in lieu of exercising their right of re-entry, but as to the covenant by the lessees to deliver up the premises in good repair at the end of the term the reversioners had obviously to wait till the end of the term before they could found any proceedings on that covenant. In my opinion the principle stated in the authorities to which I have referred is entirely applicable to the present case, and the liquidators having elected to hold the premises for the sake of the profit rental they obtained ought to be allowed to hold them only on the terms and conditions contained in the lease. I hold therefore that the reversioners are entitled to be paid in full the amount of their claim and not merely to prove for dividends in respect of it.

Solicitors for applicants: *Clarke, Rawlins & Co.*
Solicitors for respondents: *Kekewich, Smith & Kaye.*

A. C.

C. A.
1918
SARGANT J.
Oct. 30, 31; *Nov.* 1.
C. A.
1919
Jan. 31; *Feb.* 3, 4, 5, 6, 21.

LLOYD-JONES *v.* CLARK-LLOYD.

[1917 J. 1226.]

Settled Land—Unopened Mines—Tenant for Life and Remainderman—Grant of Take-notes by Tenant for Life—Receipt of Rents and Premiums—Lease by Crown to Tenant for Life of Gold and Silver in Mines—Release of Crown's Right of Pre-emption of Base Ores—Sub-lease by Tenant for Life—Acquisition of Lease by Tenant for Life for Benefit of Estate—5 W. & M., c. 6, ss. 2, 3—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 2 (10) (*ii.*) (*iv.*), 11, 53.

A tenant for life, impeachable for waste, under a settlement which included real estate and unopened mines severed from the surface, which was not included in the settlement, granted a take-note or licence for 3 years to search for and work gold and other ores in the mines subject to the rights of the Crown (if any). The tenant for life subsequently acquired a lease from the Crown for 21 years of the gold and silver ores in the mines together with a release of the Crown's statutory right of pre-emption over the base ores. He then granted further take-notes and leases of the mines for short terms, all of which expired during his life, and received rents and premiums. None of the take-notes or leases were valid under the Settled Land Acts, under which alone he had power to deal with the mines. On the expiration of the Crown lease he obtained a renewal for a further period of 21 years, and granted valid separate sub-leases of the gold and silver ores and of the base minerals for the residue of the Crown term less one day. On the death of the tenant for life in 1916 the tenant in tail in remainder, who had barred the entail, brought an action against the executors of the tenant for life claiming the amount of the premiums and three-fourths of the rents received by him, and a declaration that the plaintiff was entitled to the subsisting Crown lease subject to and with benefit of the sub-leases:—

Held, by Sargant J., that the take-notes and leases for short terms being invalid under the Settled Land Acts the rents and premiums received thereunder could not be recovered by the plaintiff, and that the subsisting Crown lease and sub-leases did not belong to the estate.

The Court of Appeal affirmed the first part of the decision of Sargant J., but reversed the second, on the ground that the tenant for life had used his position to obtain the Crown lease, and that so far as the release of the right of pre-emption over the base ores was concerned that lease extended to something which was included in the settlement. He must therefore be taken to have acquired the lease as trustee for the beneficiaries, and the plaintiff was entitled to the unexpired portion of the lease subject to and with benefit of the sub-leases.

Principle of *Keech* v. *Sandford* (1726) Sel. Cas. 61; 2 Wh. & T. L. C., 8th ed., 706, applied.

ACTION.

By a deed dated August 24, 1714, Rowland Lloyd (second son and devisee of the real estate of Simon Lloyd) and William Lloyd (eldest son of Simon Lloyd) granted to Ellis Jones, his heirs and assigns, lands in the parish of Trawsfynydd, in the county of Merioneth, at the date of the action called Blaen Cwm Prysor, excepting and reserving unto Rowland Lloyd his heirs and assigns the mine, mines or minerals in part of the lordship of Prysor, alias Blaen Cwm Prysor, and also all other mines and minerals in the lands there before granted with the appurtenances "one of which said mine, mines or minerals were heretofore worked in and wrought in in the lifetime of the said Simon Lloyd, Together with all the benefit and advantages thereof, with free liberty of ingress, egress and regress to trench, dig, mine, seek and search for all and all manner of mine, mines or minerals" in any part of the granted premises, and out of the said mine, mines or minerals "all and all manner of ores, to scour, cleanse and work the same" upon any part of the granted premises, "and for carrying away the mine, mines or minerals there found or to be found through any part" of the granted premises.

By an indenture dated August 25, 1714, Ellis Jones, as well for and in consideration of the reservation or exception in the previous deed, as also for prevention of any doubts or mistakes that might happen to arise by reason of the same reservation or exception, bargained and sold to Rowland Lloyd his executors, administrators and assigns, all the mines and minerals therein mentioned (being those mentioned in the previous deeds), and also the full and free liberty therein mentioned to work and use the other means therein mentioned. To hold for the term of 500 years at a peppercorn rent.

The mines were about 664 acres in extent. The mines and minerals (together with houses and land at Bala yielding about 600*l.* or 800*l.* a year) afterwards became vested in George Price Lloyd, who was at the dates of his will and death seised of the mines, houses and land in fee simple.

George P. Lloyd by a codicil directed that his real estate

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should, after the death of his wife (who predeceased him), be held by the trustees therein named in trust to raise certain sums, and subject thereto he devised his real estate to James Bowen Lloyd for life, with remainder to his first and other sons successively in tail male, with remainder to George Lloyd for life, with remainder to his first and other sons successively in tail male, with remainder to Edward Evans (who assumed the name of Lloyd) for life, with remainder to his first and other sons successively in tail male, with remainder to John Lloyd Griffith for life, with remainder to his first and other sons successively in tail male, with remainder to John Lloyd Jones for life, with remainder to his first and other sons successively in tail male.

George P. Lloyd died on October 11, 1867.

George Lloyd (second tenant for life) died without issue in 1868.

James Bowen Lloyd (first tenant for life) died on August 18, 1875, without having had issue.

John Lloyd Griffith, the fourth tenant for life, died without male issue in the lifetime of Edward Evans Lloyd, and John Lloyd-Jones and his first and second sons also died in Edward Evans Lloyd's lifetime, the two sons having had no issue.

Edward Evans Lloyd died on April 17, 1916, without having had male issue, and having by his will appointed Sybil Margaret Clark-Lloyd and John Cullimore his executors, and they proved his will in August, 1916.

On the death of Edward Evans Lloyd, Simon Lloyd-Jones, the third son of John Lloyd-Jones, succeeded to the estate as tenant in tail male, and he, in April, 1916, barred the entail in all the property.

On the death of James Bowen Lloyd, Edward Evans Lloyd entered into possession as tenant for life, and by an agreement or take-note dated March 21, 1887, after reciting that he was seised of or entitled to the ores and minerals within and under the lands part of Blaen-y-Cwm, he granted to Abraham Faulkes and Simon Jones a licence for 3 years to search for and obtain, subject to the rights of the Crown (if any),

all manganese, copper, lead, gold, and gold ore which might be found within, under, or upon land containing 218 acres forming part of Blaen-y-Cwm and of the 664 acres, with full power to work the same, paying the rent of 5*l.* for the first year, 10*l.* for the second year, and 15*l.* for the third year, and paying by way of royalty, in lieu of the yearly rent, for all manganese, copper, lead and gold ore raised, one-twentieth part in value of all ores made merchantable as therein mentioned; and it was thereby agreed that if the lessees should assign the licence or the ores, mines and minerals demised or any part thereof they would pay to E. Evans Lloyd one-tenth part of the purchase money, and that if they applied for a lease, he would grant the same for a term not exceeding 40 years from the date of such application at an annual rent of 50*l.* to merge in a royalty of one-twentieth, and that the lessees and their assigns should not call upon E. Evans Lloyd to produce his title to the premises and that his covenant for quiet enjoyment should be sufficient. This agreement was under hand only and did not contain any provision for re-entry.

The undertakers entered under the take-note, and began to work, but the Crown intervened in April, 1888, on the ground that the gold and silver mines, being Royal mines, belonged to the Crown, and by a lease dated May 28, 1889, between Queen Victoria of the first part, George Culley, the Commissioner of Woods in charge of the Land Revenues of the Crown in Wales, of the second part, and E. Evans Lloyd of the third part, Culley, as such Commissioner as aforesaid, on behalf of Her Majesty and by the authority of the Acts 10 Geo. 4, c. 50, and 14 & 15 Vict. c. 42, and of all others enabling him in that behalf, with the warrant of the Commissioner for the Treasury, demised to E. Evans Lloyd all gold, gold ore, silver, silver ore, and other substances containing gold or silver as therein mentioned, within, under or upon the lands called Cwm Prysor Farm, containing 664 acres, or in or upon the parts of the said land in which the substrata and other minerals other than those thereby demised belonged to the lessee, with full power to search for

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and carry away the same, and the right of purchasing any ore of copper, tin, iron, or lead found within, under or upon the said land or any part thereof exercisable by or on behalf of Her Majesty, her heirs or successors, by virtue of any statute or statutes or otherwise howsoever, To hold the said premises from October 10, 1888, for 20 years, subject to the yearly rent of 1*l.* and certain royalties. And it was declared that nothing in the lease should operate as a grant of any gold, gold ore, silver, or silver ore within, under or upon any land in which the substrata and other minerals did not then belong to E. Evans Lloyd.

By an agreement or "take-note" dated August 24, 1889, reciting that E. Evans Lloyd was seised of and entitled to the ores and minerals under the lands thereinafter mentioned, and that he had agreed to work and search for gold and silver ores within the same under a lease or licence from the Crown, it was witnessed that he granted to John Griffith and James Evans Jones licence for 3 years to search for and obtain all and all manner of minerals, ores, manganese, copper, lead, gold, silver, gold, silver and copper ores, calamine, fossils and all other useful and valuable earths, minerals and substances whatsoever which might be found in or upon lands containing about 400 acres, being part of a farm called Blaen-Cwm Prysor, with the full benefit of the powers and authorities given by the Crown to E. Evans Lloyd to search and work for gold and silver and gold and silver ores within the said premises, subject to payment of 50*l.* on the execution of the agreement and a yearly rent of 15*l.* for the first year and 20*l.* for the other two years, or royalties on ores and minerals which should be sold. And it was provided that in the event of the sale of the said agreement for the raising of gold and silver to any person or company, E. Evans Lloyd should have one-third in cash of the consideration for the transfer. That document also contained a recital that the lessor was seised of or entitled to the ores and minerals, and an agreement to grant a lease; but there was the following special provision: "But, inasmuch as the said lessor is only tenant for life of the minerals other

than gold and silver, nothing herein contained shall be binding on the owner for the time being of the said minerals other than the said Edward Evans Lloyd to grant any such lease."

By an agreement dated June 30, 1893, after a recital that E. Evans Lloyd was seised of and entitled to the ores and minerals within and under the lands thereinafter described, part of the said land Blaen-y-Cwm, and that he had agreed to grant to Simon Jones a licence to search for manganese, copper, silver and silver ore, lead, gold and gold ore within and under the said lands for the term of five years, and to grant a lease thereof for the remainder of the term of 20 years granted by the Crown by the said lease of May 28, 1889, if applied for by the licensee, E. Evans Lloyd granted to Simon Jones licence for 5 years from March 25 to search for the said substances within, under or upon the said lands, subject to a yearly rent of 25*l.* and the royalties therein mentioned, and agreed, if so required, to grant a lease of the said premises to Simon Jones for a term not exceeding the term (except one day) granted by the Crown to E. Evans Lloyd, at a minimum rent of 50*l.* per annum to merge in a royalty equal to double the Crown royalty. The agreement also contained a special covenant that if the licensee should assign, he should pay the lessor one full half part of the net purchase money.

By a deed dated April 14, 1897, in consideration of 600*l.* paid to Simon Jones and 600*l.* paid to E. Evans Lloyd, the former, by the direction of the latter, assigned to E. T. Holden the benefit of and interest of Simon Jones under the agreement of June 30, 1893, for the residue of the term thereof granted, and Holden covenanted to pay the rent of 25*l.* and perform the covenants contained in that agreement. The provisions of and rights under this deed were merged in a lease to Holden, dated June 16, 1897.

By a deed dated April 14, 1897, reciting that E. Evans Lloyd was seised of or entitled to the ores and minerals within the lands described in the Crown lease of May 28, 1889, E. Evans Lloyd, in consideration of 100*l.* and the rents and royalties thereinafter reserved, demised the gold and

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silver ores and minerals under the lands in the Crown lease (except the part comprised in the agreement of June 30, 1893) to E. T. Holden for the residue of the lease from the Crown except one day, at a rent of 25*l.* a year for the first year and 50*l.* a year for the remaining years.

By a lease dated June 16, 1897, the Royal and base mines under the 218 acres were demised in similar terms except that no fine or premium was paid, and that the rent was different. The term was for the residue of the term granted by the Crown lease except the last day thereof.

The leases of April 14, 1897, and June 16, 1897, were subsequently assigned to the Arenig Gold Mining Co., Ld.

By a lease dated March 24, 1909, and made between the King of the first part, Edward Stafford Howard, C.B., the Commissioner of Woods in charge of the Land Revenues of the Crown of the second part, and E. Evans Lloyd of the third part, E. S. Howard, in exercise of the powers of the Crown Lands Acts, 1829 to 1906, and of all other powers enabling him in that behalf and with the consent of the Treasury, on behalf of His Majesty demised unto E. Evans Lloyd all gold and silver, and all ores and other substances and rights in respect thereof, belonging to His Majesty in right of his Crown (other than the right of pre-emption hereinafter released) within, under or upon lands called Cwym Prysor Farm, containing 664 acres, and on behalf of His Majesty released unto E. Evans Lloyd all right of pre-emption vested in or exercised by His Majesty by virtue of the Act 5 W. & M., c. 6, or of any other statute or statutes or otherwise over all or any of the ores and substances to be obtained during the term thereinafter mentioned from the hereditaments demised "being land within or under which or part or parts of which there is or may be copper ore, tin ore, or lead ore." To hold the demised premises for 21 years from October 10, 1908, at a yearly rent of 15*l.* and a royalty of two one-hundredth parts in value of the gold and silver raised.

By a lease dated March 25, 1909, E. Evans Lloyd sub-demised to the Arenig Gold Mining Co. the same gold

and silver ores and other substances, with the benefit of the release from the right of pre-emption, for 21 years from October 10, 1908, less the last day thereof, at a yearly rent of 50*l.* and such further sum as therewith should amount to a royalty equal to two one-hundredth parts in value of the gold and silver raised.

By a lease dated March 25, 1909, E. Evans Lloyd, as tenant for life, demised to the same company all the same mines and minerals (other than those belonging to and demised by the Crown) under the 664 acres for the term of 21 years from October 10, 1908, except the last day thereof, at the yearly rent or royalty of one-twentieth of the mines and substances raised (other than gold, silver, and gold and silver ores and substances in respect of which a royalty might be payable under the other lease of the same date).

Evans Lloyd received about 1400*l.* by way of dead rent from the property, the two premiums or fines of 50*l.* and 100*l.*, and the 600*l.* above mentioned.

This action was brought by Simon Lloyd-Jones against the executors of E. Evans Lloyd, claiming (1.) a declaration that E. Evans Lloyd acquired the Crown leases as trustee for the persons who were at the date thereof beneficially interested under the settlement created by George Price Lloyd's codicil; (2.) a declaration that the Crown lease of March 24, 1909, with the benefit of the underlease thereof, was vested in the defendants in trust for the plaintiff; (3.) an order on the defendants to assign to or procure the same to be vested in the plaintiff; (4.) an account of the rents and profits received by E. Evans Lloyd under the leases and licences above mentioned and any other leases or licences granted by him; (5.) a declaration that three-fourths of the rents and profits, and the sums of 50*l.*, 600*l.* and 100*l.* should have been set aside as capital moneys; (5A.) alternatively, a declaration that the plaintiff was entitled to the whole of the rents, profits and capital sums; (6.) payment in accordance with the declarations.

The action was tried before Sargant J. on October 30, 31 and November 1, 1918.

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A. Grant K.C. and *J. M. Paterson* for the plaintiff.
Romer K.C. and *MacSwinney* for the defendants.

SARGANT J. (after referring to the nature of the action). The claim is based mainly on the special provisions of the Settled Land Act, 1882; but many other points arise, particularly questions arising from the fact that the mines, which form part of the settled property, were mines in which Colonel Evans Lloyd had only rights of mining disconnected from the soil, and also arising from the other circumstance that, besides mines in the ordinary sense, which have been sometimes referred to as "base mines," there were within the area in question gold and silver mines belonging to the Crown, which were leased by the Crown to Colonel Evans Lloyd and, according to the claim of the plaintiff, must be taken to have been leased to Colonel Evans Lloyd in his capacity of tenant for life, and so as to give the remainderman the same rights in those mines as in the base mines.

I will deal first with the position of Colonel Evans Lloyd with regard to the base mines. These had, in fact, been severed from the surface by a deed of August 24, 1714, and on the occasion of its execution the owner of the land not only reserved to himself all the mines under the 664 acres, but, in addition, he reserved extensive powers to work the mines for the purpose of insuring as fully as possible that those rights should be effective by taking a lease for 500 years from the grantee of the surface, so that he might have something by way of direct grant to strengthen his position. I think that lease made no difference at all to the transaction, but that the whole transaction is open to the comment that it was at the time expected that there would be a working of these mines, and that the mines were considered of value as likely to yield a profit, if not immediately, at any rate at no remote period of time. Just before that grant there had been some slight working, which is referred to in the grant itself, but Mr. Romer has conceded, on behalf of the defendants, that down to the time of the death of the testator, George Price Lloyd, there had been no working of the mines

for 150 years, that physically the mines were not open mines, and that any former working had for a long time entirely ceased—so that, without doubt, the mines were in the position of unopened mines.

The testator, George Price Lloyd, owned, in addition to the mines under the 664 acres, a number of houses and a certain amount of land at Bala yielding about 600*l.* or 800*l.* a year. [His Lordship stated the testamentary dispositions of the testator, and the date of his death, and of the death of James Bowen Lloyd, the first tenant for life, on August 18, 1875, and continued :] Colonel Evans Lloyd entered into possession at that time and remained in possession until his death on April 17, 1916, so that he was in possession for about 41 years. That being so, on March 21, 1887, he signed a take-note [to the contents of which, as set out above, his Lordship referred] with regard to about one-third of the area of these mines. In that take-note Evans Lloyd recited that he was seised of or entitled to the ores and minerals in question. Under that take-note the undertakers entered and began to work. This was brought to the notice of the Crown, whose advisers naturally objected, and pointed out that the Royal mines, the gold and silver mines, belonged to the Crown. The lease of May 28, 1889, from the Crown to Evans Lloyd dealt not only with the 218 acres but with the whole of the 664 acres and granted to him the rights to all the gold and gold ore within the lands and also the right of pre-emption which the Crown had in respect of other substances intermingled with the gold ore, and contained the express provision " that nothing in these presents contained shall operate as a grant, or demise, or lease of any gold or gold ore, or silver or silver ore within under or upon any land in which the substrata and other minerals do not belong to the lessee." So that undoubtedly the grant was made to him because he was in the possession of the mines.

[His Lordship referred to the terms of the various leases down to and including that of June 16, 1897, and continued :] That concludes one series of transactions, and down to that

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time there is no definite recital on the face of the documents showing in plain terms whether the lessor is attempting to grant by virtue of the powers in some settlement, or by virtue of his estate, or precisely in what capacity he is dealing with the property.

But after that Colonel Evans Lloyd, who was then getting an old man and began to be apprehensive that questions might be raised as to his exact position with regard to these leases, came to deal with the Crown and with the persons to whom the prior leases had been assigned when the Crown lease and the leases granted by him were about to expire. At that juncture he thought it necessary to define his position as strictly as possible. He was taking a new lease from the Crown of the Royal mines, and asked that any reference to the fact that he was the owner of the base mines should be left out of the lease. The Crown acceded to that request. Its advisers knew by that time of his position, and that he was tenant for life, and the statement was left out of the new lease.

Colonel Evans Lloyd also thought it desirable that, in lieu of granting a lease of the Royal mines and base mines together, he should grant a separate lease of each set of mines.

By a lease of March 25, 1909, he sub-demised the Royal mines to the Arenig Gold Mining Co., Ld., for the term granted to him less one day, and he did that obviously in respect of an ownership which he claimed as entirely his, and the rent was reserved as in respect of an absolute ownership on his part, that is to say as superior lessee.

On the other hand, in dealing with the base mines he professed to do so purely as tenant for life, and he granted a lease of them, also dated March 25, 1909, to the company, in a form which would be good either under the Settled Land Act, 1882, or under the Settled Estates Act, 1877, if s. 46 of the latter Act did authorize a lease of these mines by him as tenant for life.

Before the time when those two leases were granted no lease had been granted which complied with the provisions either of the Settled Land Act, 1882, or the Settled Estates

Act, 1877, unless in the latter case s. 46 applied. The lessees have worked more or less, or entirely, unsuccessfully; they have spent some thousands of pounds, and have got gold of the gross value of about 53*l.* No waste, except the merest technical waste, has been committed as regards the settled hereditaments, but Colonel Evans Lloyd has received about 1400*l.* by way of dead rent from the property, two premiums or fines of 50*l.* and 100*l.*, and also 600*l.* payable on the assignment I have mentioned. That being so, the plaintiff, the remainderman, now seeks to recover from his estate the 50*l.*, the 100*l.* and the 600*l.*, and also three-fourths of the rents received by Colonel Evans Lloyd, on the ground of the leases having been granted, or being deemed to be granted, under the Settled Land Act. It is said that the Crown leases must be taken to be a sort of adjunct to the other leases and to have been obtained by Colonel Evans Lloyd in that right; that therefore the provisions of the Settled Land Act apply; and that the plaintiff, as remainderman, is entitled to the benefits provided by that Act. That is a perfectly intelligible claim, but one with regard to which very important points of law arise.

The two main points of law which arise are these: First, whether under the settlement made by the codicil Colonel Evans Lloyd was entitled as tenant for life to work the mines for his own benefit and to treat them on the same basis as if they had been open mines; and secondly, a point of great importance, whether his position was such, with regard to the mines generally, that he was disqualified from accepting the grant of the Crown leases of the Royal mines except as a trustee for the persons interested under the settlement.

As regards the base mines, the argument for the defendants is that in some way or other the terms of the document of August 14, 1714, affect the question, and show that what was intended to be reserved was something of a workable nature. I think that the terms of that document have nothing to do with the matter, and that all that was effected by that document was that the mines were reserved in an effective condition. But then it is said that, inasmuch as these were mines detached

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from the surface and incapable in themselves of yielding any profit at all unless there was a working of the mines, therefore the true intention of the settlement made by the codicil, which provided that the tenant for life should get the rents and profits during his life, must have been that rents and profits should be earned, and accordingly that the tenant for life must by implication be deemed to have power to let the mines and turn the settled asset to account. As aiding that argument, *Dashwood* v. *Magniac* (1)—a case of settled timber—was referred to. After considering that case carefully, I do not think that it goes nearly so far as Mr. Romer sought to press it. In the case of a timber estate it is obvious that, if the timber is only cut in due course of husbandry, the inheritance is not affected; the cutting does not interfere with it; the value of the timber on the estate remains, roughly speaking, the same throughout, although, of course, fresh timber takes the place of old timber. But the working of mines destroys the inheritance as the mines are worked out; and, although I feel the force of the argument that intention must always be looked at in considering whether a tenant for life is or is not to enjoy the particular fruits of the settled property, and agree that the intention is paramount in all these cases, still there are in this case two considerations which prevent the settlement from being nonsensical unless the tenant for life was to have the power of working. In the first place, there is the consideration that what was settled was not this specific property alone, not these mines only, but the whole of the testator's real estate, which included a number of houses and other property yielding income. It would be news to me to learn that in the case, which so often happens, of large settled estates having as part of them mines lying under a surface which is not part of the settled estates, the tenant for life, although not unimpeachable for waste, is, apart from any power given to him by statute, to have the power of working unopened mines lying under surface belonging to others because otherwise there would be nothing of which he could enjoy the fruits during his life. If any distinction

(1) [1891] 3 Ch. 306.

of that kind could have been properly drawn between the case of settled mines lying below surface which does not belong to the settled estate and the case of settled mines lying under surface belonging to the settled estates, it would have been drawn long ago, and therefore I think that the argument that the tenant for life ought by implication to be entitled to enjoy the profits derived from working the mines is not at all convincing, and further, that any such reason would be inconsistent with what appears to be the common practice in such matters. Tenants for life are usually anxious to get for themselves the full benefit of the settled property, and if there had been any distinction of the kind which I have referred to, it would have been long since established.

There is another reason which makes me think this argument for the defendants far from conclusive—namely, that when the codicil took effect there was in existence legislation—the Leases and Sales of Settled Estates Act, 1856—which preceded the Settled Estates Act, 1877—under which there could, with proper restrictions, be granted leases of unopened mines. Therefore, in settling at that time unopened mines on a tenant for life, and then over in favour of remaindermen, there was nothing absurd, because the tenant for life might enjoy the profits arising from the mines if and when they were dealt with in accordance with existing legislation. I am also supported by the language of Sugden, L.C. of Ireland, in *Coppinger* v. *Gubbins* (1), where he recognized that a good deal of difference might be made by the circumstances of the property in question. In that case there had been a demise of a bog in Ireland, and a question arose as to the right to cut turf, and whether the bog was settled by itself or in conjunction with other property. Although I have come to the conclusion that the tenant for life was not entitled to work these mines or to allow others to work them by virtue of the provisions of the settlement, I think the point—on which an argument of great interest has been addressed to me on both sides—is a difficult one, as to which a tenant for life in the position of

(1) (1846) 3 J. & Lat. 397.

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Evans Lloyd, even if he had been more actively engaged in law than he was—he was for a time a solicitor and was afterwards called to the Bar—might well have entertained the greatest possible doubt.

I will now deal with the rather subsidiary question whether a lease of these mines could be lawfully granted by the tenant for life—not independently of statutory power and by virtue of any implied power in the settlement, but by virtue of s. 46 of the Settled Estates Act, 1877. Here the mines are in fact the settled estates, and therefore strictly the language of s. 46 would apply to these settled estates. But when I consider the whole scope of the section and look at the special provisions of s. 4 of the same Act as to mining and other leases, and when I see that every demise under s. 46 is to be made without impeachment of waste, it seems to me that s. 46 only gives power to lease the surface when the surface is settled, and does not allow settled estates to be leased by a tenant for life where those estates consist simply and solely of unopened mines. I think that any other construction would be contrary to any just interpretation of the effect of the whole statute.

As regards the question relating to the Crown leases, it is not necessary that I should determine a question on which there seems to be a conflict of authority in *The Case of Mines* (1) and *Lyddall* v. *Weston*. (2) But I do notice that in the former case there is a solemn determination of the Court, whereas in *Lyddall* v. *Weston* (2) Lord Hardwicke is only using one of a great number of arguments on which to form his judgment, and that he had not before him the express decision in *The Case of Mines*. (1) Probably the better opinion would be that the Crown can grant a lease of Royal mines although the effect will be to cause disturbance of the subject who is in possession of the surface or of adjoining mines. But it seems to me clear that the Crown has the right to grant a lease of that kind, of Royal mines, when dealing with somebody who is the freeholder in possession. Mr. Grant at first said that the mere fact that Evans Lloyd was tenant for life in

(1) (1567) Plowd. 310, 336. (2) (1739) 2 Atk. 19.

possession and came in contact with the Crown and obtained leases from it, would not be sufficient to make him a trustee for the other persons interested under the settlement. He put his case rather upon the special provisions of s. 53 of the Settled Land Act, 1882, which makes a tenant for life who exercises the powers of the Act a trustee for the purpose of that exercise. Then he said that, inasmuch as the other mines could not be dealt with except by the exercise of the powers of that Act, and the Crown only leased to Evans Lloyd because he could exercise the power given by the Settled Land Act, therefore he must have taken that lease as an adjunct to the power, and so was bound to hold the lease as a trustee. That argument is too refined for me to follow it. In reply Mr. Grant rather put it that because Evans Lloyd was there, and was tenant for life, and was taking something which was intermixed with the settled property, therefore he must take the asset of the lease as part of the settled property.

I am not convinced at all by the argument about the exercise of the power under the Settled Land Act, and, as regards the general position of a tenant for life, it is well known that in many respects he is in a better position than a trustee. For instance, a tenant for life having power to consent to the exercise of a power of sale can sell to or buy from a trustee, which a trustee could not do. No doubt, as Mr. Romer admitted, if a tenant for life actually deals with the trust property—by obtaining a renewal of a lease, or buying the settled property from a mortgagee of it, or, after encroaching, takes advantage of statutory provisions which enable him to get a lease of the encroachment—in none of these cases can he set up an individual beneficial title. It is quite different when he is buying or dealing with something that is no part of the settled property. Two of the cases cited appear to be conclusive on this point. In *Giddings* v. *Giddings* (1) there was not an actual decision to that effect. The plaintiff had not in fact claimed the additional property which had been obtained by the trustee, but only part of the property the lease of

(1) (1827) 3 Russ. 241.

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which had originally belonged to the trustee, but Copley M.R., in giving judgment, adopted the view that there could have been no successful claim to the extra property, which had not been comprised in the lease, as belonging to the settled estate. And Sugden, L.C. of Ireland, in *Acheson* v. *Fair* (1) actually decided the point. The last part of the marginal note refers to this point, and is as follows: "A testator seised under a lease pur auter vie, devised the lease upon certain trusts; upon the determination of the lease, the trustee of the will obtained a new lease, which comprised the premises in the original lease, together with additional lands. Held, that the trusts of the will did not attach upon the additional lands." The Lord Chancellor of Ireland in his judgment said: "Upon the question whether the lease of 1826 was a graft upon the old lease as to the additional lands demised by the new lease, a case, before Sir William Grant, of *Randall* v. *Russell* (2) was referred to; and in a subsequent case, *Hardman* v. *Johnson*, in the same volume (3), Sir W. Grant again decided that the purchase by the lessee of the reversion in fee was for his own benefit. I will not carry this doctrine beyond the limits to which the authorities have already extended it. If a man, having a fiduciary character in respect of certain lands, obtain a new interest, that will be bound by the old trusts; but in this case I am asked to go much further, and to hold that what he takes besides the old interest, although in new lands, is bound by the trusts of this will, because the new lands are comprised in the same lease with the old lands. There is no such rule of equity. Is there any equity to follow what a trustee obtains in a property not subject to the trust? If, indeed, trustees mix up property in an improper manner, so that the trust property cannot be distinguished from their own, they may suffer from the consequence of their conduct; but here I must take it for granted that the newly acquired lands can be severed from the others." I see no reason why the rents and royalties from the Royal mines should not be severed from those in respect of the base mines, as indeed

(1) (1843) 3 D. & War. 512, 524. (2) (1817) 3 Mer. 190.
(3) (1815) 3 Mer. 347.

they are in the leases recently granted. Then the Lord Chancellor says: "They may be liable to indemnify the others from the increased rent; but to say that I am bound thus to follow the trustee through all the acts of his life, and that if he took different lands by a different lease from the same party, I am to hold that the old trusts attached upon them would be most unreasonable." In the case before me it is pretty clear that the Crown granted the first lease to Evans Lloyd because he was there and had affected to grant a lease to somebody who was beginning to search, and that the Crown never inquired whether its lessee was tenant for life, or whether the property was settled, and that when in 1909 it was found that the property was settled and that Evans Lloyd was the tenant for life, the Crown never stated that it could grant a lease to him as tenant for life or for the benefit of the settled property, and left out any reference to the circumstance that he was entitled to any other mines. I think that matter was purely discretionary on the part of the Crown, and that Evans Lloyd was only obtaining this extra or separate property because he was in touch with the Crown, which very likely knew that there would be a difficulty if the lease were granted to someone who was not there. I can see no principle on which the doctrine I have referred to can be extended so as to make Evans Lloyd a trustee in respect of the Crown lease.

Then I have to deal with the very difficult question whether the leases for short terms which have been granted by Evans Lloyd ought or ought not to be treated as leases under the Settled Land Act. The first take-note, for three years, seems to be clearly one with regard to which he never intended to invoke, in any way whatever, the powers of the Settled Land Act. He was there as tenant for life, and he allowed the undertakers to come and search for three years to see whether they could find gold, and he agreed to grant them on demand a lease for forty years, and, no doubt, if they had found payable gold and silver and had demanded, he would have had to consider his position, and probably the undertakers, for their own protection, would have looked

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into the Act to see whether the lease would hold water, and if Evans Lloyd had not been able to grant a lease, he would have been liable to heavy damages for having failed to grant what he had contracted to grant. But to say that anybody ever intended that these take-notes should take effect other than out of Evans Lloyd's interest as tenant for life and by virtue of the estate he had so as ultimately to entitle the undertakers to demand a lease from him seems absurd. I think that this take-note, at any rate, could not have been intended to take effect under the Settled Land Act, and in a number of respects it does not comply with the requirements of the Act. I quite accept what Mr. Grant says, that if a transaction can take effect by virtue of a power but cannot take effect by virtue of the lessor's estate, then, prima facie, effect should be given to the transaction out of the power. But then comes the question, what is the transaction? Is it a grant of a lease merely for three years, or is it a grant of a lease or take-note such as is to be found in the document before the Court? It seems to me that the transaction is to be found in the document before the Court, and although that document would not necessarily take effect out of the lessor's estate—because he might die within the three years—yet, on the other hand, the document could not take effect at all as an exercise of the statutory power because it did not comply with the essential conditions of the statute; and, therefore, it is far more reasonable to take the view that the document was to take effect out of the lessor's estate, which it would do in nineteen out of twenty cases. In my judgment, the first take-note cannot be given effect to as a contract under the Settled Land Act, and the same remark applies to the other take-notes.

The next take-note, that of August 24, 1889, contains a most important provision which assists the conclusion I have already arrived at with regard to the first take-note, for it expressly provides that the inheritance is not to be bound. That seems to be a conclusive indication that it was not intended to take effect under the Settled Land Act, for the binding of the inheritance is the object of having the

transaction under the Act. The take-note of June 30, 1893, was for a little longer term—namely, five years; and at that time Evans Lloyd was some years older, but that makes no difference. In my judgment, the take-notes are clearly not instruments operating, or which were intended to operate, under the Settled Land Act, 1882, and any claim of the plaintiff resting on the receipt of money under those take-notes seems to be incapable of succeeding. If that be so the claim for the 50*l.* and the 600*l.* must fail.

With regard to the two documents of June 16, 1897, I have felt more doubt, because they did comply with the requirements of the Settled Land Act, except in one respect—namely, that they did not contain a proviso, or any sufficient proviso, for re-entry. There again you have to consider what was the transaction, and the transaction was a grant of a lease on certain terms. But the granting of a lease on those terms could not be effected under the Settled Land Act, 1882, or, as I have held, under the Settled Estates Act, 1877, or under the general power of the tenant for life, or under an implied power to be inferred from the settlement. The result is that neither document of June 16, 1897, was one which the tenant for life was entitled to enter into, and the consequence is that he and those claiming under him have been committing waste. If Evans Lloyd was not entitled to grant those leases under the settlement effected by the will simpliciter, or under s. 46 of the Settled Estates Act, 1877, or under the provisions of the Settled Land Act, 1882, I cannot judicially determine that he must be deemed to have granted the leases under the third of those possible powers because the conditions of that third power are more nearly fulfilled than are the conditions under which the first or second power could be exercised. In my judgment, I cannot draw any such inference. I feel pretty sure that Evans Lloyd never meant to exercise the powers under the Settled Land Act, and for this among other reasons, that the document recites that he is seised or entitled, and contains no reference to the power but is an ordinary grant. It is to be noticed that the term is not long. It is only one of 12 years,

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which is coincident with the length of the lease of the Royal mines. The true explanation seems to be that the really important asset was the Royal mines; that it was thought well to have a lease bringing in the other mines, which were comparatively of small importance, so as to avoid doubt; and that as these base minerals were of such slight value, very little if any attention was paid to the way in which the lease of these minerals was framed. The lessees took their chance. Evans Lloyd granted and they took the lease without considering what was the special power or the special estate which enabled him to grant it. It seems to me, therefore, that the plaintiff is not entitled to treat Evans Lloyd as having granted the lease under a power under which he did not intend to grant it. A lease for the same length of time and on many of the same conditions might have been granted under that power, but this particular lease could not have been granted under that power, and there is no reason why I should say that the lease must be deemed to have been so granted so as to make Evans Lloyd responsible for the receipts obtained under the lease as if it had been granted under that particular power. That being so, down to this point the plaintiff fails, because the result of my judgment is that his claim is not in respect of these particular receipts, in which case Mr. Romer admitted that the Statute of Limitations would be no defence, but is in respect of a claim for damages for waste, in which case Mr. Grant, per contra, admitted that the Statute of Limitations had run and that Evans Lloyd's executors could not be rendered liable.

As regards the two leases granted in 1909, the case is governed in part by what I have already decided. Here Colonel Evans Lloyd grants separate leases of the Royal mines and the base mines. The former, as I have held, were no part of the settled property, and both sides agree that the lease of the base mines complied entirely with the requirements of the Settled Land Act. There was no fine payable for which he was liable to account, and the royalties which were reserved in respect of the base minerals were not received because no base minerals were recovered.

In the result, therefore, I have come to the conclusion that the estate of Colonel Evans Lloyd is under no liability to the plaintiff, and that the action fails.

F. E.

The plaintiff appealed. The appeal came on for hearing on Jan. 31, 1919.

A. Grant K.C. and *J. M. Paterson* for the appellant. Sargant J. has rightly held that the mines were unopened mines which the tenant for life was not entitled to work except under the powers of the Settled Land Acts. Colonel Evans Lloyd either acted in his capacity of tenant for life under those powers or else he was a trespasser. If he was in a position to do what he did as tenant for life the Court will not regard him as a trespasser. He was impeachable for waste and he could only grant the leases under the powers of the Settled Land Acts. If a tenant for life grants an informal lease and receives money in respect of it, he is not entitled to take advantage of the informality and say the transaction is void and at the same time to retain the benefit of it. There is no allegation of fraud against the tenant for life, but the submission is that the Crown lease was obtained in such circumstances that it is the property of the estate according to the principle established in *Keech* v. *Sandford.* (1) It was acquired by him solely by virtue of his position as tenant for life. The principle laid down by the House of Lords in *Aberdeen Town Council* v. *Aberdeen University* (2) shows that property outside the settlement can be bound by *Keech* v. *Sandford.* (1) That principle applies to the present case.

Under s. 11 of the Settled Land Act, 1882, the appellant is entitled to three-fourths of the rents of all the minerals, including the gold, as forming part of the settled estate.

The doctrine that a renewal of leaseholds by a tenant for life enures for the benefit of the remainderman applies equally to a purchase of the reversion: *Phillips* v. *Phillips* (3); *In re Lord Ranelagh's Will.* (4)

(1) Sel. Cas. 61; 2 Wh. & T. L. C., 8th ed., p. 706.

(2) (1877) 2 App. Cas. 544, 549.

(3) (1885) 29 Ch. D. 673.

(4) (1884) 26 Ch. D. 590.

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The Crown owns all gold and silver mines and has a right of pre-emption over the base metals: 1 W. & M. c. 30, ss. 1, 2, 3; 5 W. & M. c. 6. The provisions of those Acts were considered in *Attorney-General* v. *Morgan*. (1) In the *Case of Mines* (2) it was held that the Crown had the right to go on the land of a subject and work the gold and silver, but in *Lyddall* v. *Weston* (3) it was held by Lord Hardwicke that "Where the Crown has only a bare reservation of Royal mines, they cannot grant a licence to any person to come upon another man's estate and search for such mines. . . . But when mines are once opened, they can restrain the owner of the soil from working them, and can either work them themselves, or grant a licence to others to work them."

It is submitted that this is a Royal mine but not in the sense used in *Attorney-General* v. *Morgan*. (1) That case does not throw much light upon the present.

The subsisting Crown lease was granted to the tenant for life because he had an interest in the property—because he was the tenant for life.

[SWINFEN EADY M.R. The advisers of the Crown knew that he was tenant for life, and because he was owner of the base minerals a lease of the gold was granted to him.]

If a tenant for life obtains a benefit by virtue of his position as tenant for life he cannot retain it for himself.

Griffith v. *Owen* (4) shows that the doctrine of *Keech* v. *Sandford* (5) is not limited to renewable leaseholds.

The authorities establish the following propositions:

1. If a tenant for life takes a lease of property which is so inextricably mixed with property of which he is tenant for life that a severance is impossible he holds it for the estate.

2. If he takes a lease of additional property which he takes because he is tenant for life and which no one else could have obtained he holds it for the estate.

3. If he acquires a lease of property which others might have acquired but which by reason of his being tenant for

(1) [1891] 1 Ch. 432.
(2) Plowd. 310, 336.
(3) 2 Atk. 19.
(4) [1907] 1 Ch. 195.
(5) Sel. Cas. 61; 2 Wh. & T. L. C., 8th ed., p. 706.

life he has a greater advantage of obtaining, he may or may not acquire it for the estate: *Keech* v. *Sandford*. (1)

4. If he gets a lease of property which anyone might have got but which he gets incidentally because he is tenant for life he does not hold it for the estate. The fact of his being tenant for life in that case is not the causa causans. It is not the result of his being tenant for life: *Acheson* v. *Fair*. (2)

The present case falls within the first proposition. The test is, whether the tenancy for life is the causa causans of obtaining the property.

In *In re Morgan* (3) the Court extended the rights of the testator's estate over the whole of a renewed lease, which included additional property, taken by an executor on the surrender of an old lease. That case does not appear, however, to be quite in harmony with *Acheson* v. *Fair*. (2)

Giddings v. *Giddings* (4), which was relied on by Sargant J. in the court below, does not carry the matter any further. A tenant for life under such circumstances is a trustee for the inheritance.

In *In re Biss* (5) Collins M.R. laid down that there is an irrebuttable presumption that a tenant for life who obtains the renewal of a lease is under a personal incapacity to retain a benefit against the remainderman.

In *Rowley* v. *Ginnever* (6), where a tenant for life had purchased adjoining land under a right of pre-emption attached to the settled property, it was held that the right of pre-emption must be taken to have been exercised by him for the benefit of the estate. That is very like the present case. Here the property is so inextricably mixed within the first proposition stated that the tenant for life must be deemed to have acquired the Crown lease as trustee for the estate.

As to the rents and premiums received under the take-notes it is said that those instruments were not valid leases under the Settled Land Acts, but Evans Lloyd had no power

(1) Sel. Cas. 61; 2 Wh. & T. L. C., 8th ed, p. 706.
(2) 3 D. & War. 512, 524.
(3) (1881) 18 Ch. D. 93.
(4) 3 Russ. 241.
(5) [1903] 2 Ch. 40, 56.
(6) [1897] 2 Ch. 503.

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to grant any leases except as tenant for life. The Court will not assume that he was a trespasser. The principle is laid in Co. Litt. 42*a*, 42*b*: "First, when the construction of any act is left to the law, the law which abhorreth injury and wrong, will never so construe it as it shall work a wrong: and in this case, if by construction it should be for the life of the lessee, then should the estate taile be discontinued, and a new reversion gained by wrong: but if it be construed for the life of the tenant in taile, then no wrong is wrought. And it is a generall rule, that whensoever the words of a deed, or of the parties without deed, may have a double intendment, and the one standeth with law and right, and the other is wrongfull and against law, the intendment that standeth with law shall be taken."

If the take-notes are to be regarded as valid documents they must have been granted by Evans Lloyd as tenant for life. They are voidable at the option of the remainderman if they do not comply with the provisions of the Settled Land Act: *In re Handman & Wilcox's Contract.* (1)

If a tenant for life grants a lease not in the exercise of his powers the remainderman can regard it as invalid. If there is a defect in form—as, for example, if the lease is for 21 years without a covenant for payment of rent—the remainderman may object or not as he pleases. The tenant is however estopped and is bound by the lease.

[*Campbell* v. *Leach* (2) and *Doe* v. *Langdon* (3) were also referred to.]

The Court will refer the leases to the only power under which they could be granted—namely, under the Settled Land Acts. In that case the rents must be dealt with according to the Act—namely, three-fourths set aside as capital and one-fourth paid to the tenant for life: *In re Daniels.* (4)

The mere non-compliance with the statutory requirements does not make a lease invalid. The Court will assume that the tenant for life in granting these leases was acting under lawful authority.

(1) [1902] 1 Ch. 599, 602.
(2) (1775) Amb. 740, 748
(3) (1848) 12 Q. B. 711.
(4) [1912] 2 Ch. 90.

Statutory aid is given to defective leases by the Leases Act, 1849 (12 & 13 Vict. c. 26), ss. 2, 5. See Farwell on Powers, 2nd ed., p. 351.

As to the construction of the documents in favour of the remainderman see Fawcett on Landlord and Tenant, 3rd ed., p. 51. "In the construction of powers, the intention of the parties is to prevail. Subject to that principle the restraints imposed by a limited power given to a tenant for life are to be taken strictly against him, where they are imposed for the benefit of the remainderman." And see *Orby* v. *Lord Mohun*. (1)

Gilbert, p. 58: "A third thing I premise is this, That the reservation and deed being to be made upon a restraint of the power must be taken strictly against the tenant for life, because of the limited acts he is to pursue, and liberally for the remainderman, because that restraint was intended for his benefit." That coupled with Co. Litt. 42*a* shows that the document must be construed as executed under lawful authority, and not as executed by a wrongdoer or trespasser.

Chandler v. *Bradley* (2) is not an authority against the appellant.

It is not necessary that there should be any reference to the Settled Land Act in the document: *Mogridge* v. *Clapp*. (3)

[SCRUTTON L.J. referred to *Doe* v. *Watts*. (4)]

That is no longer the rule in equity. It would prevent persons taking advantage of the Leases Act, 1849 (12 & 13 Vict. c. 26).

In *Doe* v. *Lady Cavan* (5) it was held that the lease of a tenant for life with power of leasing under certain conditions must strictly comply with the conditions; and if it vary from them in the interest demised, or the rent reserved, it cannot be supported against the remainderman.

[They also referred to *Doe* v. *Harvey*. (6)]

Romer K.C. and *MacSwinney* for the respondents

(1) (1705) Gilb. Eq. R. 45, 58; 2 Vern. 531.
(2) [1897] 1 Ch. 315.
(3) [1892] 3 Ch. 382, 388.
(4) (1797) 7 T. R. 83.
(5) (1794) 5 T. R. 567.
(6) (1823) 1 B. & C. 426.

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(defendants). It is said that both the Crown leases were obtained by Colonel Lloyd as trustee for the benefit of the estate. That is an attempt to extend the doctrine of *Keech* v. *Sandford* (1) to, and to confuse it with, the doctrine that a trustee cannot make a benefit out of his trust. The latter doctrine applies only to the case of trustees.

Randall v. *Russell* (2) was the first case in which it was suggested that the doctrine as to the renewal of leases applied to the purchase of reversions, and it was held that it did not.

That case (3) shows that *Keech* v. *Sandford* (1) applies only where the tenant for life for the purpose of obtaining the property has made use of some right which he possesses as tenant for life.

In *Phillips* v. *Phillips* (4) it does not appear very clearly why the tenant for life was held to be a trustee. It has been thought that it was following the dictum of Sir W. Grant in *Randall* v. *Russell.* (2) Both those cases were considered by Stirling J. in *Longton* v. *Wilsby* (5), where a tenant for life in remainder of a reversion expectant on the determination of a lease had purchased the reversion and it was held that he did not hold it as trustee for the remainderman.

In *Bevan* v. *Webb* (6), where Warrington J. dealt with *Randall* v. *Russell* (2) and *Phillips* v. *Phillips* (4), it was held that if a trustee of a lease which is not renewable by custom or contract buys the reversion he may, in the absence of fraud, hold it for his own benefit.

The doctrine of *Keech* v. *Sandford* (1) is primarily applicable to renewal of leases. But there are cases in which the tenant for life is entitled to show that, in spite of the nature of the property, there is in the particular circumstances nothing inequitable in his claiming the renewed lease for his own benefit: *Griffith* v. *Owen.* (7) He is not necessarily a trustee of every advantage which he gets as tenant for life. He

(1) Sel. Cas. 61; 2 Wh. & T. L. C., 8th ed., p. 706.
(2) 3 Mer. 190.
(3) 3 Mer. 190, 192.
(4) 29 Ch. D. 673.
(5) (1897) 76 L. T. 770.
(6) [1905] 1 Ch. 620.
(7) [1907] 1 Ch. 195, 204.

may be in a better position to get some advantage just because he is tenant for life. If by reason of his representing the estate as tenant for life he gets some advantage then he is within the doctrine: *In re Biss.* (1)

[EVE J. referred to *James* v. *Dean.* (2)]

It may be that Sir W. Grant was wrong in *Randall* v. *Russell* (3), because the purchase of the reversion takes away the possibility of a renewal. In the case of a tenant for life who gets the renewal of a lease no doubt the presumption is irrebuttable. And so in the case of a tenant for life who purchases from a mortgagee of the settled property, he destroys the equity of redemption, and must hold for the benefit of the reversion: *Griffith* v. *Owen.* (4)

In re Morgan (5) was the case of a trustee utilizing the trust property for the purpose of acquiring some other property for his own benefit. The proposition there laid down is not disputed.

The doctrine of *Keech* v. *Sandford* (6) does not apply where a tenant for life is dealing with something that is no part of the settled property: 2 White & Tudor's Leading Cases, 2nd ed.; *Giddings* v. *Giddings* (7); *Acheson* v. *Fair.* (8)

There is no authority to the contrary.

In re Morgan (5) is not such an authority.

Aberdeen Town Council v. *Aberdeen University* (9) does not apply to the case of a tenant for life.

Here the subject of the settlement was the base minerals. The mines Royal belonged to the Crown and the Crown had a right of pre-emption over the base minerals. The subject has no right of working in such a case except under a licence from the Crown: *Attorney-General* v. *Morgan.* (10)

The lease of the mines Royal was obtained by Colonel Lloyd in his personal capacity and not as tenant for life.

The take-notes were not valid leases under the Settled

(1) [1903] 2 Ch. 40, 55.
(2) (1805) 11 Ves. 383.
(3) 3 Mer. 190.
(4) [1907] 1 Ch. 195.
(5) 18 Ch. D. 93.
(6) Sel. Cas. 61; 2 Wh. & T. L. C., 8th ed., p. 706.
(7) 3 Russ. 241.
(8) 3 D. & War. 512.
(9) 2 App. Cas. 544.
(10) [1891] 1 Ch. 432.

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Land Acts. It has been assumed that the mines are unopened and therefore that the tenant for life has no right to work them for his own benefit. That is not a question of fact, but of intention. It has been held that a mine, for the purposes of tenant for life and remainderman, is unopened, though physically it may be opened yet disused. These minerals were reserved with full powers of working, and the settlor must have intended that the tenant for life should enjoy them. A tenant for life stands in the same position in relation to mines and minerals as he does in relation to timber: *Dashwood* v. *Magniac.* (1) *Campbell* v. *Leach* (2) must be treated as relating to opened mines.

In the absence of mala fides, money paid to a legal tenant for life as consideration for the surrender of a mining lease not granted under the Settled Land Act was held to belong to the tenant for life as a casual profit: *In re Hunloke's Settled Estates.* (3)

Here the first take-note might have taken effect by reason of the estate of the tenant for life or it might have taken effect under the Settled Land Acts. Where a person has a power of appointment under several instruments and purports to exercise every power enabling him the Court may consider which power is most for his interest to exercise and which is first in point of time: *Earl of Lonsdale* v. *Lowther.* (4)

If a tenant for life work unopened mines it is waste, and the remedy of the remainderman is an action against him. If the tenant for life had no "power thereunto enabling him" he committed waste, and as soon as he got the minerals the remainderman could have claimed them as he could have done in the case of timber cut by him. In that case the defence of the Statute of Limitations would have been good: *Higginbotham* v. *Hawkins.* (5)

Here in fact there was no waste as regards the base metals, for none were got.

Many of the provisions of s. 7 of the Settled Land Act

(1) [1891] 3 Ch. 306.
(2) Amb. 740.
(3) [1902] 1 Ch. 941.
(4) [1900] 2 Ch. 687.
(5) (1872) L. R. 7 Ch. 676.

were broken in the expired leases. They contained no proviso for re-entry. Whether the best rent was reserved is a matter for argument. It could not have been intended that the take-notes should take effect under the Settled Land Act. They could not operate to bind the remaindermen, and they show that the tenant for life only intended to deal with his life estate. It is submitted upon all these grounds that the action fails.

A. Grant K.C. in reply.

Cur. adv. vult.

Feb. 21. SWINFEN EADY M.R. (after stating the facts down to the granting of the first take-note). Other take-notes were granted in 1889 (when Colonel Lloyd received a payment of 50*l.*) and in 1893, and, on the assignment of the latter in 1897, Colonel Lloyd received 600*l.*, being one moiety of the consideration for the assignment. Colonel Lloyd on April 14, 1897, purported to grant a lease for 20 years from October 10, 1888, of the minerals under 445½ acres, and received a sum in the nature of a fine or premium of 100*l.* He also received divers sums for rents payable. It does not appear that any mining royalties were paid or became payable during Colonel Lloyd's life, and the claim of the plaintiff is not based upon any waste actually committed by Colonel Lloyd or by his authority. Indeed, any such claim would be barred by the Statute of Limitations. The plaintiff seeks to enforce payment of the 50*l.* and 600*l.* and 100*l.* as fines representing capital, and of three-fourths of the mining rents received as capital, and insists that Colonel Lloyd's estate is liable to pay over to him those sums.

I am of opinion, that the answer to the claim in this respect is that Colonel Lloyd was not validly exercising any powers that he possessed. His grants in fact expired in his lifetime, and could not bind his successor in title, as the provisions of the Settled Land Act were not complied with. In the take-note of August 24, 1889, he made it clear in express terms that he was only tenant for life, and that nothing therein contained was to be binding on any owner for the time being other

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than himself. If, under these circumstances, minerals had been actually extracted from the land, the plaintiff could have claimed them as soon as severed, like timber improperly cut down by a tenant for life impeachable for waste. No claim, however, is made on this basis. The plaintiff's claim is not based upon any damage to the estate having been occasioned. He sues for money had and received to his use, and claims that he can affirm the irregular transactions of Colonel Lloyd, and claim the benefit of them. These grants, however, took effect, if at all, out of the life estate of Colonel Lloyd; the inheritance has not been prejudiced by them; they had expired before the plaintiff's remainder fell into possession. The persons taking under these irregular grants have run the risk of their defective title. It was urged that as Colonel Lloyd, by following the Settled Land Acts, could have made valid leases, the case fell within the general rule, that "whensoever the words of a deed, or of the parties without deed, may have a double intendment, and the one standeth with law and right, and the other is wrongfull and against law, the intendment that standeth with law shall be taken": Coke upon Littleton, 42*a*, 42*b*. But every document contains some neglect to comply with the Settled Land Acts; the grants were never validly made; and, after the expiration of these grants, there is no question of confirming them. There is nothing to confirm, after their expiration. There is not any case of a "double intendment." I agree with the view expressed by the learned judge, that without doubt the mines were in the position of unopened mines, and that the tenant for life was impeachable for waste, and not entitled to work them, except under the provisions of the Settled Land Acts. I also agree that the will does not confer by implication any power upon the tenant for life to work unopened mines, on the ground that otherwise he would not derive any income from them. The codicil contained a general devise of real estate, some of which was producing income, and the will refers to the rents and profits of the real estate, and all the words of the will are satisfied without the need for implying that the testator necessarily intended that these

minerals which he had never worked should be worked by the tenant for life, so that some income could be obtained from them. Moreover the leasing power in the will only extends to leases for 21 years, and so that the lessee be not made dispunishable for waste. The will does not contain any indication that tenants for life were to work the minerals, but rather the contrary. The case of *Dashwood* v. *Magniac* (1) is far removed from the present case.

For these reasons, I am of opinion that the appeal of the plaintiff fails so far as it relates to the claim for 50*l*., 100*l*. and 600*l*., and to have three-fourths of the mining rents received by Colonel Lloyd treated as capital.

The other question raised by the appeal is whether the plaintiff has a valid claim to the lease dated March 24, 1909, granted by the Crown to Colonel Evans Lloyd, for 21 years from October 10, 1908.

[The Master of the Rolls referred to the terms of that lease, and continued :] According to the evidence, there was not any "Mine Royal" in the settled property. See 1 W. & M. c. 30, s. 4, and *Attorney-General* v. *Morgan* (2); but the only interest of the Crown was the pre-emptive right, governed by the statute of 5 W. & M. c. 6. By an indenture of sub-lease of March 25, 1909, Colonel Lloyd sub-demised to the Arenig Gold Mining Co., at an increased rent, and for a similar term (less one day), all the gold and silver ores and other substances vested in him by the Crown lease of March 24, 1909, together with the benefit of the release of the right of pre-emption. By another indenture of even date, Colonel Lloyd demised to the said company all the mines and minerals, other than those belonging to the Crown, for the same period. It is not disputed that this lease is a valid and proper lease under the Settled Land Acts. It is clear from the correspondence that at the date of the Crown lease of March 24, 1909, the advisers of the Crown were fully aware that Colonel Lloyd was tenant for life of the minerals under the 664 acres, and granted that lease to him, with the release of the right of pre-emption, because he was tenant

(1) [1891] 3 Ch. 306. (2) [1891] 1 Ch. 432.

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for life of the settled minerals. In their letter of December 3, 1908, Messrs. Loxton wrote to Colonel Lloyd "that we fear we are fixed with notice now that you have only a life tenant's interest." It also appears from the correspondence that it is usual when the Crown grants leases to mine owners of mines Royal to include in such leases a release of the right of the Crown to pre-emption of the ores of certain baser metals. Upon the facts, it is manifest that Colonel Lloyd used the advantage of his position as tenant for life of the settled minerals, to obtain the Crown lease of March 24, 1909; also that such lease, so far as the release of the right of pre-emption is concerned, extends to something which was certainly the subject-matter of the settlement—namely, the baser ores, which, on the death of Colonel Lloyd, devolved on the plaintiff. Again, Colonel Lloyd in his sub-lease has not only demised the Crown mines or such interest therein, if any, as he acquired under the lease, but has also included for the term of 21 years (less one day) the right of pre-emption of the baser ores, being settled minerals. These facts are quite sufficient to bring the case within the doctrine of *Keech* v. *Sandford*. (1) In *James* v. *Dean* (2), on the rehearing, Lord Eldon, when considering the position of a tenant for life, said that even if the interest of which the person was tenant for life was so short as three months, yet if he had acquired a lease through the opportunity afforded him during that short period, he would be a trustee of it. The foundation of the rule rests upon public policy, to prevent persons in such situations from acting so as to acquire a benefit for themselves. As tenant for life of settled minerals, Colonel Lloyd could not acquire a lease of the pre-emptive right of the Crown over the baser ores, and, after his death, pass the lease to a stranger, to hold adversely to the person next entitled under the settlement.

In my judgment, the plaintiff is entitled to a declaration that the Crown lease of March 24, 1909, was acquired by Colonel Lloyd as trustee for the parties then beneficially interested under the settlement made by the codicil, and

(1) Sel. Cas. 61. (2) (1808) 15 Ves. 236.

that upon his death such lease, subject to and with the benefit of the underlease of March 25, 1909, became vested in the defendants in trust for the plaintiff. The plaintiff is not however now entitled to require payment of any part of the profit rental received by Colonel Lloyd during his life. This profit arises from sub-letting the parcels comprised in the Crown lease, which formed no part of the settled estate. It is only the unexpired part of the lease which passed to the plaintiff. I think that the judgment should be as follows: Discharge judgment of Sargant J. Declare that the Crown lease March 24, 1909, in the pleadings mentioned was acquired by Edward Evans Lloyd for the benefit not only of himself but of all other parties beneficially interested in the minerals settled by the testator's codicil. And that upon his death on April 17, 1916, the beneficial interest therein passed to the plaintiff subject to and with the benefit of the underlease of the same premises dated March 25, 1909. Order the defendants to assign the said Crown lease to the plaintiff or as he may direct, and to pay to him the amount of the profit rental received since the death of Colonel Lloyd, the plaintiff paying a due proportion of the cost of the lease having regard to the period unexpired at Colonel Lloyd's death. Dismiss the rest of the action. Let the defendants pay to the plaintiff his costs of this action, except so far as the same have been increased by the plaintiff's claim to the three several sums of 50*l*., 600*l*. and 100*l*., and to three-fourths of the mining rents received by E. E. Lloyd, deceased. Tax the defendants' costs relating to such last-mentioned claim and let the plaintiff pay the same—usual set off.

As each party has partly succeeded and partly failed in this appeal, let each party bear his own costs of this appeal. Liberty to apply.

SCRUTTON L.J. I have listened carefully to the lengthy and complicated arguments that were addressed to us in this case, and I have come to three conclusions. The first is, that I concur generally with the results arrived at by my learned brothers, and the processes and arguments by which

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they have reached those results. The second is, that while I understand, and see the good sense of, the doctrine of *Keech* v. *Sandford* (1) as explained by the Master of the Rolls, I am not at present satisfied that some of the recent developments of that doctrine are really logical results of the principle, and I think that some of the recent cases may require the consideration of the Court of Appeal in a case which properly raises the question. The third conclusion I have arrived at is that as this case does not raise the question on which I have felt some considerable doubt, I should not assist the administration of the law by adding a separate judgment. I content myself with saying that I concur.

EVE J. The plaintiff's claim to relief falls under two heads, first, a claim to recover the fines and three-fourths of the rents received in respect of the mineral leases which have determined; and, secondly, a claim to be entitled to the subsisting lease of the Royal mines and to the benefit of the underlease thereof.

In my opinion, there is no substance in the defendants' contentions that the mines were opened mines, or that the sums paid in 1889 and 1897 were not payments in the nature of a fine or premium within s. 2, sub-s. 2 (10) (ii.) of the Settled Land Act, 1882. Not only is there nothing in the settlement to lend colour to the suggestion that the testator contemplated the working of the minerals by the successive life tenants, but the express power of leasing contained in the will negatives any such intention. Nor was the settled property in any sense an exclusively mineral estate, in which case it is possible powers to work and win might have been inferred in favour of the limited owners. Upon the other point I need only remark that there is nothing in the Settled Land Acts which either expressly or impliedly limits a fine to a payment made in one sum or made on or contemporaneously with the execution of the lease. It is not necessary in the view I take of the first head of the plaintiff's claim to determine whether or no the late tenant for life acquired the Royal

(1) Sel. Cas. 61; 2 Wh. & T. L. C., 8th ed., p. 706.

mines as trustee for the inheritance. In favour of the plaintiff, I will assume that he did, and upon this assumption the sole question is: Can the plaintiff now recover from his estate the fines and three-fourths of the rents received by him from working these and other minerals forming part of the settled estate? It is not disputed that on the facts as I have so far found or assumed them to be the estate of the late tenant for life would be liable in damages for waste, but the Statute of Limitations is a bar to any action on the part of the plaintiff upon these lines, and he can only succeed if he can establish that the late tenant for life received and retained the fines and rents now claimed as a trustee for the remainderman. He contends that by adopting the acts of the tenant for life he can place him in that fiduciary position. But none of the transactions or documents in respect of which the fines or rents were paid was a lease made under any power contained in the Settled Land Acts, and the fallacy underlying the plaintiff's argument on this part of the case is that, while on the one hand he asserts his readiness to adopt and confirm the acts of the tenant for life, on the other he insists on his right to convert the result of these acts into something which it is not. It is not adoption pure and simple but adoption with a most material modification. The leases are not leases under the Settled Land Acts—they are leases and agreements made without any authority, statutory or otherwise, and are dealings with the settled estate giving rise, it is true, to a claim against the late tenant for life sounding in damages but not dealings which it is competent for the remainderman by any notional adoption or ratification to transform into something else which they never were. It is only by effecting this transformation that he can claim against the late tenant for life, on the footing that he had done something which he never in fact did or purported to do. The plaintiff's claim could only arise in respect of fines and rents received under leases executed by virtue of the statutory power—these leases never were so executed, and on this part of the case the plaintiff, in my opinion, wholly fails.

The subsisting lease from the Crown was granted on

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March 24, 1909, for a term of 21 years from October 10, 1908, and the rights thereby demised were at once underleased at an annual minimum profit rental of 50*l*. The negotiations for this lease, which was in renewal of an antecedent one dated in 1889 and expiring in October, 1908, commenced in February, 1908. At that time and for some years previously the tenant for life was alive to the possibility of some question arising as to the respective rights of himself as tenant for life and the remainderman to the demised premises, and he was undoubtedly desirous of avoiding this possibility by keeping the dealings with these premises distinct from the dealings with the settled minerals. In form, therefore, the two classes of minerals were, as far as practicable, dealt with separately, but the separation was not wholly complete in form, and, in substance, was very far from being so. The parcels in the lease from the Crown purport to include all gold and silver within the area under which the settled minerals lie, and the Crown thereby sold and released "unto the lessee" all right of pre-emption vested in it over the copper, tin, iron and lead ores forming part of the settled minerals.

According to the evidence, this mine was not at the date of the lease, and never has been, a "Mine Royal," that is to say, a mine of gold and silver; it was within the protection of s. 4 of the statute 1 W. & M. c. 30, and the interest the Crown had in the gold and silver extracted thereout was the right to take them if it chose to pay the value as fixed by the later statute, 5 W. & M. c. 6, of the copper, tin, iron and lead ores accompanying them. Part of the settled property, therefore, was represented by an interest in the gold and silver underlying these 644 acres and by the chance, to which the presence of gold gave rise, of the Crown exercising its right of pre-emption over the base minerals. I do not think we are concerned to inquire—and we certainly have no materials on which to answer satisfactorily any such inquiry, whether this chance was an asset or the reverse; for present purposes it is enough to say that these elements—the interest in the gold and silver and the chance of obtaining from the Crown the statutory prices for the baser minerals—formed

part of the settled property, and when the tenant for life started trafficking in the settled property and accepted a lease purporting in express terms to demise and release these interests to him he cannot, in my opinion, be heard to assert in these courts that he holds them otherwise than as a trustee for the inheritance.

On these grounds alone I think the plaintiff is entitled to the relief he claims in respect of the subsisting Crown lease and the underlease of March 25, 1909, and, subject to contributing his apportioned share of the costs of the lease, to the rents come to the hands of the defendants since the death of the tenant for life under such underlease; but I am not prepared to say that, apart altogether from these considerations, he would not have been entitled to the same relief by reason of the late tenant for life having obtained the Crown lease by virtue of his position as tenant for life of the other minerals. As at present advised, I think he would.

Solicitors for appellant: *Clarke, Calkin & Son.*

Solicitors for respondents: *Rider, Heaton, Meredith & Mills, for Birch, Cullimore & Co., Chester.*

G. A. S.

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[1918 W. 927.]

Solicitor—Charging Order—"Property recovered or preserved"—Property of Person not employing Solicitor—Dispute between Husband and Wife as to Property—Receiver appointed at Instance of Wife—Abandonment of Claim by Wife—Application by Wife's Solicitors for Charging Order—Solicitors Act, 1860 (23 *&* 24 *Vict. c.* 127), *s.* 28.

In an action by a wife against her husband claiming as her property the assets of a bridge club carried on by them jointly, the wife obtained an order for the appointment of a receiver and manager of the property. She subsequently abandoned her claim in the action. On an application by her solicitors for a charging order under s. 28 of the Solicitors Act, 1860, in respect of their costs of obtaining the receivership order:—

Held (reversing the decision of Peterson J.), that the property had neither been recovered nor preserved through the instrumentality of the solicitors and that they were therefore not entitled to the order.

APPEAL from a decision of Peterson J.

The facts are fully stated in the judgment of the Master of the Rolls, and were shortly as follows: The plaintiff and defendant, who were husband and wife, carried on a bridge club on the premises occupied by them. The lease was in the name of the husband, who was rated as the occupier, and paid the rates and taxes. The active management of the club was undertaken by the wife. In the early part of 1918 matrimonial differences occurred between the husband and wife, and the husband left his wife and ceased to reside at the club. The wife remained in occupation of the premises. In April the husband filed a petition for the dissolution of his marriage. On June 26 the wife issued a writ against the husband, claiming (1.) a declaration that the chattels and effects on the club premises were her property, and that the lease was held by the husband as trustee on her behalf; (2.) an injunction to restrain the husband from selling, assigning, mortgaging, or parting with the furniture, chattels, and effects belonging to the club; and (3.) the appointment of a receiver and manager. On July 19 the wife moved before Peterson J. for an order appointing her receiver and manager.

The husband opposed the appointment of the wife as receiver and manager, but consented to the appointment of an independent receiver. An order was accordingly made referring it to chambers to appoint an independent receiver and manager. Ultimately, on October 1 an order was made appointing a receiver and manager.

Before the latter order was made, the wife, in September, left this country for South Africa, having previously instructed her solicitors not to proceed further with the action, and to withdraw her defence in the divorce proceedings. In February, 1919, the wife's solicitors issued a summons in the action, under s. 28 of the Solicitors Act, 1860, for an order that the furniture, chattels, and effects of the club might stand charged with the payment of the taxed costs, charges, and expenses incurred by them on behalf of the wife of and in reference to the appointment of the receiver and manager.

Peterson J. held that prima facie the appointment of a receiver was a preservation of the property within the meaning of s. 28 of the Act, and that there was nothing in the circumstances of the case which prevented him from exercising his discretion in the applicant's favour. He accordingly made the order asked for.

The husband appealed.

C. J. Mathew K.C. and *J. F. Carr* for the appellant. It is submitted that no property was "preserved" for the defendant by the instrumentality of the solicitors within the meaning of s. 28 of the Solicitors Act, 1860. "Preserved" in that section means preserved from the claim of a wrongful claimant—the salvage of property for the rightful from a wrongful owner. The question is whether a solicitor preserves property by preventing it being stolen by his client. In no sense can it be said that any furniture, chattels, or effects have been preserved.

[SWINFEN EADY M.R. What is the high water-mark of cases in which a charging order has been made where the property has been preserved for a third party?]

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Bailey v. *Birchall* (1), upon which all the later cases are founded. In that case it was held that a solicitor was entitled under the section to a charge upon property recovered or preserved, for the costs of the litigation by which it was recovered or preserved, irrespective of his client's interest in the property, and although it turned out that the latter had not, and never had, any interest therein.

In *Twynam* v. *Porter* (2), where an action brought by a cestui que trust against his trustee for an account was compromised without the knowledge of the solicitor of the cestui que trust by the payment of a sum of money to the cestui que trust, the solicitor was held entitled to a charge on the sum so paid.

Bulley v. *Bulley* (3) was a trustee case and has no application to the present case. The defendant here is not a trustee. *Emden* v. *Carte* (4) was a case in which the property was clearly recovered by the solicitors. *Greer* v. *Young* (5) shows that the charge of a solicitor is in the nature of salvage and is not confined to the interest of his client but may extend to that of other persons. It must be by reason of the employment of the solicitor that the property is recovered for some one. *Scholey* v. *Peck* (6) does not carry the matter any farther. The effect of s. 28 is there stated by Romer J. as follows: "It (i.e., the section) authorizes a charge not on the mere interest of the plaintiff, but on all property recovered in the action, whether for the plaintiff only, or for him in connection with others. It is not necessary that the property charged should belong to the same person who employed the solicitor; but it must be by reason of the employment that the property is preserved." The section contemplates that where a solicitor has done good work he should not be deprived of his costs. There must have been a preservation of the property. In the present case there has been no preservation. In *Pinkerton* v. *Easton* (7), where a suit for administration was commenced by the plaintiff and accounts

(1) (1865) 2 H. & M. 371.
(2) (1870) L. R. 11 Eq. 181.
(3) (1878) 8 Ch. D. 479.
(4) (1881) 19 Ch. D. 311.
(5) (1883) 24 Ch. D. 545.
(6) [1893] 1 Ch. 709, 711.
(7) (1873) L. R. 16 Eq. 490.

brought in but the suit was subsequently abandoned it was held that nothing had been recovered or preserved by the plaintiff's solicitor, and that he was not entitled to a charge.

Peterson J. considered himself bound by the authorities to hold that the property had been preserved because a receiver had been appointed. That, it is submitted, is not the law.

Arnold Herbert K.C. and *M. R. Emanuel* for the respondents. The argument for the appellant does not lay sufficient stress on the fact that an order was made appointing a receiver and that that order was not appealed against. It must be assumed therefore that the receiver was properly appointed for the purpose of preserving the property for the person who should ultimately be held to be entitled to it. Peterson J. thought the case was a proper one for the appointment of a receiver. The appointment by the judge is therefore prima facie a preservation of the property even if it be to preserve it from damage arising from disputes between the parties themselves. Here the appellant himself took advantage of the appointment of the receiver. The receiver went into possession at his request and on his indemnity, and for his protection, to receive the takings of the club. The Court will not deprive the solicitors of their costs because their client proves to be elusive. The present case comes within *Scholey* v. *Peck* (1), and is, if anything, a stronger case. You have here a person who actively employs the receiver. When once you have a state of circumstances pointed out by the Solicitors Act the matter becomes one for the discretion of the judge. The property here was preserved from erosion. It was suffering damage from the quarrels between the parties. Members were leaving the club. The cases come to this that a charge may be given upon property even if the owner is not a party to the action and even if he does not employ the solicitor. Peterson J. was seised of all the circumstances of the case, and thought it right to give the solicitors a charge, and the matter being one for the exercise of his discretion this Court will not interfere. No doubt the case must be brought within the Act but if it is the grant of a charge is a matter for the

(1) [1893] 1 Ch. 709.

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discretion of the judge. It is submitted therefore that the appointment of the receiver was prima facie a preservation of the property; that if it was not then it was wrong to appoint the receiver, and that the order appointing him was not appealed against.

C. J. Mathew K.C. was not called upon to reply.

SWINFEN EADY M.R. This is an appeal by the defendant from an order of Peterson J. making in favour of the applicants, Messrs. Emanuel, Round & Nathan, solicitors, a charging order upon all and singular the furniture, chattels and effects of the Fitzjohn's Bridge Club, situate at 46, Grove End Road, Hampstead, in the county of London, of which Lionel Henry Lemon had been appointed receiver and manager under orders in that action dated respectively July 19, and October 1, 1918, for the payment of the taxed costs and expenses of Messrs. Emanuel, Round & Nathan incurred on behalf of the plaintiff of, and in reference to, the appointment of the receiver and manager. The order was made under s. 28 of the Solicitors Act, 1860, which provides: "In every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter, or proceeding in any Court of Justice, it shall be lawful for the Court or judge before whom any such suit, matter, or proceeding has been heard, or shall be depending, to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved." The defendant appeals and contends that the property embraced by the order was neither recovered nor preserved in any manner in the action in question, or by anything that took place in the action, and therefore that the learned judge had no jurisdiction to make the charging order.

The facts are quite simple. It appears that in or about the month of February, 1915, the defendant Percy Wingfield purchased the goodwill and undertaking of a bridge club in Grove End Road, which was called the Fitzjohn's Bridge Club. He had a lease of the premises, and was the rated occupier and paid the rates and taxes. He employed one

Dixon to assist him in managing and carrying on the club, who apparently occupied the position of steward, the active management of the club being committed to the plaintiff, the defendant's wife. Matters proceeded smoothly until the beginning of the year 1918 when matrimonial differences occurred between the husband and wife, and in consequence of what had happened the husband ceased to reside at the club and left the plaintiff, and on April 26 he filed a petition for the dissolution of his marriage. Down to May 22 the proceedings in the Divorce Court were defended on behalf of the wife by a certain firm of solicitors, but on that date there was a change of solicitors and new solicitors were instructed to represent the wife. On May 24, two days after that change occurred, a letter was written by the former solicitors on behalf of the wife to the husband's solicitors, in which after referring to other matters connected with their matrimonial disputes they said: "With regard to the club would your client be prepared to sell this? If so, will you kindly let us know the amount he would be prepared to accept"; that is for the club which the husband was then claiming as his but in respect of which the wife was then manager. Shortly after the change of solicitors a new position was taken up by the wife, of which I find no previous indications. The wife then in June advanced the claim that the husband was trustee of this property for her, the property that she was proposing to buy, and on June 26, 1918, she issued a writ against her husband in which she claimed a declaration that the lease of the premises and the furniture, chattels and effects of the bridge club belonged to her, and that the husband held the lease as trustee for her and an injunction to restrain the husband from selling assigning or mortgaging or in any way charging the lease, furniture, chattels and effects, or otherwise dealing with them, save as might be necessary for the proper carrying on of the club. The writ also asked that a fit and proper person might be appointed receiver and manager of the club and of the furniture, chattels and effects therein. Down to that time the wife had remained in occupation of the premises. Immediately after the writ

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was issued and before the period for entering an appearance had expired notice of motion was given on behalf of the wife that the wife might be appointed receiver and manager of this club undertaking. The position which the husband then took up was this, that he wholly objected to his wife being appointed as receiver, and having regard to the claim made by her that was not unnatural, but he said he was willing to consent to the appointment of an independent receiver and manager. In para. 20 of his affidavit he said: "I have no present intention of selling the said business and assets of the said club but it may be necessary for me to do so if it continues to be carried on at a loss. In the meantime I am willing to undertake not to sell or dispose of the same until the trial of this action or further order and consent to the appointment by this Honourable Court of an independent receiver and manager until the trial of this action or further order, but I submit respectfully that the plaintiff ought not to be appointed as manager or be employed in the management of the said business, and my said offer of an undertaking is made upon that basis." That was quite a proper attitude for the defendant to take up. He claimed the furniture and the plaintiff moved for a receiver, and without wasting money by litigating whether there should be a receiver or not, he insisted on his claim, but in the meantime if the plaintiff desires it, he said, let there be a receiver. Upon that an order was made for the appointment of a receiver, and a reference to Chambers was directed to appoint an independent person. It was opened by Mr. Herbert that no appeal was brought from that order. Obviously it was not an order which could be appealed from as the defendant himself had in his affidavit sworn that he consented to it. Such an order is not the subject of an appeal. Then the matter was carried into Chambers, and ultimately a Mr. Lemon was appointed receiver. He did ultimately give security, but before he actually did so he, with the husband's consent, took possession as receiver and entered upon the club premises. The next thing that happened was, that the wife determined to leave this country and go to South Africa, and she embarked

on a steamship which was unfortunately torpedoed and she returned to this country. Later she embarked on another ship and sailed for South Africa. She has now abandoned any claim whatever to the furniture and has instructed her solicitors not to proceed with the action.

Upon that state of facts the present solicitors of the wife, who started the action, not those originally concerned in the divorce proceedings, made an application to have an order charging their costs on the property on the ground that they had recovered or preserved it. Preserved it from whom, and against whom and against what attack? They had not recovered it because the plaintiff abandoned any claim to it. There was no hostile claim to it by any third person. It was the wife who was claiming it adversely to her husband and who then abandoned her claim. They had not preserved it for the plaintiff nor for the plaintiff jointly with anyone else. So far as the lease and the property in the chattels were concerned they remain the property of the defendant, the plaintiff having abandoned all claim whatever to them. How can it be said that this property was preserved for the defendant? The attack was made against the defendant by the plaintiff who has abandoned the attack, but nothing has been recovered or preserved for the defendant; the defendant simply by resisting the claim has preserved his own property. The ground on which the application in the court below was based was that a receiver and manager was appointed. How can it be said, it was urged, that the property was not recovered or preserved in an action when a receiver and manager was appointed. In my opinion, in the present case, the receiver and manager did not preserve the property for the defendant in any shape or form, and the contention cannot be maintained that from the mere fact of a receiver and manager being appointed the result must necessarily be that that is a step which has preserved the property for whomsoever it may concern so that the solicitor of the party at whose instance the order was made would be entitled necessarily to a charging order for the costs thereby incurred.

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In the present case I am of opinion that the property has not been recovered or preserved in the action in any shape or form. It is well settled that solicitors are entitled to a charging order in respect of property recovered or preserved not only upon the interest of their client at whose instance the proceedings are taken, but upon the shares of parties whose interest is really protected and preserved by their intervention. The common instance is where proceedings are taken in the nature of administration proceedings in which the property is preserved or recovered, as the case may be, for all the other persons interested in the estate, not only for the plaintiff, but for all the parties interested, and the books contain numerous instances in which property has been made the subject of a charging order, as having been recovered or preserved for the benefit of parties who are not parties to the litigation at all. *Bulley* v. *Bulley* (1) was an instance where there was a claim in respect of property under a prior instrument. It was there alleged that there was an earlier entail, and that if the claim in that respect succeeded all the persons whose interest arose under the subsequent instrument would not have been entitled to anything, their whole interest would have disappeared. The present case is far removed from anything of that kind. *Emden* v. *Carte* (2) is not wholly unlike it in this respect. There an undischarged bankrupt had taken proceedings to obtain the payment of certain fees which were due to him, and the defendant without any admission of liability paid a certain sum into court. The trustee in bankruptcy of the bankrupt then intervened and claimed the money. The trustee in bankruptcy was able and willing to let the bankrupt's solicitor have a charging order on the fund for costs incurred up to the time when he intervened but the bankrupt resisted his intervention and failed because the trustee ultimately succeeded in making good his claim. Then the solicitor applied that he might have a charging order not only for the costs incurred up to the time when the trustee intervened but also for the costs in opposing the claim of the trustee which the bankrupt

(1) 8 Ch. D. 479.

(2) 19 Ch. D. 311.

unsuccessfully opposed. Both Fry J. and the Court of Appeal thought such a claim was ludicrous. Fry J. went further because he even refused the solicitor the order he was entitled to, that is, a charging order up to the time when the trustee in bankruptcy intervened; but that order was made by the Court of Appeal.

In the present case when once you arrive at the conclusion that the property in question has neither been recovered nor in any way preserved for the benefit of the defendant by means of this action then any right of the Court to make a charging order disappears. No such right ever arose here.

For these reasons I am of opinion that the charging order ought to be discharged and the appeal allowed.

SCRUTTON L.J. I agree with the result arrived at by the Master of the Rolls, but as we are differing from a very careful judgment of the learned judge below, who felt himself bound by the authorities to make the order in question, I will shortly express my reasons in my own words. It has been remarked on several previous occasions that the wording of s. 28 of the Solicitors Act, 1860, which empowers the making of a charging order is exceedingly general and must receive some limitation. [His Lordship read the section and continued:] The section says nothing in express terms defining who has recovered or preserved the property; or defining from whom the property has been recovered or preserved; or defining how the property has been recovered or preserved. It is capable, if the words are taken in their widest sense, of being read as giving the solicitor who has attacked the property a charge on the property which the other solicitor has recovered from his attacks—which is absurd. In my view the section must at any rate be limited in this way: it must be found that the property is recovered or preserved by the exertions of the solicitor who is asking for the charging order, exertions of which the real owner takes or receives the benefit, and it does not apply to cases in which the property, though preserved, is preserved from the attack of the solicitor who is asking for the charging order. It has been argued before

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us that the mere fact that the Court has appointed a receiver on an application originated by the solicitor is enough to show that that solicitor is entitled to a charging order on the property. If that were so it would follow that in every case of an unfounded claim where the Court sees that a dispute is likely to injure the property—a dispute arising from the unfounded claim of the person for whom the solicitor is acting—the Court would be bound to give the solicitor of the unsuccessful party a charging order on the property of the successful party. I do not think any such extravagant consequence can be legitimately extracted from the wording of the section. I think the authorities to which we have been referred show that a charge may be obtained over another person's property if it has really been preserved by the exertions of the solicitor who asks for the charging order, particularly if the real owner takes or receives the benefit of those exertions. But I do not read those authorities as involving the proposition that when a person makes an unfounded claim which would destroy the property, and in order to prevent the property being destroyed the Court appoints a receiver, the real owner has to pay the solicitor of the person who makes the unfounded claim.

I desire carefully to guard myself as regards the full power of the Court to deal with cases where collusion between the lay clients is suggested. Unfortunately one knows from experience that not infrequently parties who have instructed solicitors suddenly make up their differences and endeavour to deprive the solicitors of any remuneration for the work they have properly done. If there is any suggestion of collusion between the lay clients or any evidence on which the Court could say there was collusion, the case would be quite different. In this case there appears to be no evidence of that kind. The wife who is carrying on a bridge club says that the bridge club is hers; her husband says: no, the bridge club is his. If he attempted to turn her out and a contest arose between them the value of the property as a bridge club would be destroyed. The wife through her solicitors makes an unfounded claim that the property is hers and asks

that she shall be appointed as receiver. That order is not granted but the Court appoints an independent person as receiver. The wife abandons her claim and her solicitors come and say that they have preserved the property for the husband. I can only say that the proposition seems to me to be so topsy-turvy that it cannot be right, and I am glad to find there is nothing in the Chancery authorities which compels me to hold that it is right. For these reasons I agree that the order of Peterson J. cannot be supported and that the charging order should be discharged.

EVE J. I agree in thinking that the order below cannot be supported. No property in my opinion was preserved in the action, and the only effect of the litigation has been to demonstrate the defendant's title to the property which already belonged to him. This result so far from being brought about by the services of the solicitors was effected in spite of their services, and it would be an absurdity and, in my opinion, a great injustice, if we were to hold that they are entitled to a charge on the defendant's property for the costs due to them as remuneration for their efforts to deprive him of it. I think the appeal ought to be allowed.

Appeal allowed.

Solicitors for the appellant: *Wingfield & Blew.*
Solicitors for the respondents: *Emanuel, Round & Nathan.*

W. I. C.

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